Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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UNIVERSITY OF COLORADO, BOULDER,
through its Board,
THE REGENTS OF THE UNIVERSITY OF COLORADO,
a body corporate;
JUDITH ALBINO, as President of
the University of Colorado, Boulder; and
WILLIAM MAROLT, as Athletic Director,
Department of Intercollegiate Athletics,

*Petitioners,*

*v.*

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the University of Colorado's program of random, suspicionless drug testing of student athletes is a constitutionally reasonable "search" under the Fourth Amendment.

2. Whether the voluntary consent given by student athletes to the University of Colorado's drug testing program is valid under the Fourth Amendment if consent to drug testing is a condition of participation in intercollegiate athletics.

## STATEMENT PURSUANT TO RULE 29.1

Petitioners are not corporations and have no parent companies, subsidiaries or affiliates.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners, the University of Colorado, Boulder, the Regents of the University of Colorado, its President, and its Athletic Director, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Colorado (Pet. App. A, *infra*) is reported at 863 P.2d 929 (Colo. 1993). The opinion of the Court of Appeals the State of Colorado (Pet. App. B, *infra*) is reported at 832 P.2d 1031 (Colo. App. 1991). The opinion of the District Court of the County of Boulder, State of Colorado (Pet. App. C, *infra*) is not reported.

## JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on November 1, 1993 (Pet. App. A). Petitioners' timely petition for rehearing was denied by the Supreme Court of the State of Colorado on December 6, 1993 (Pet. App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

**U.S. Const. Amend. IV.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

This is an action for injunctive relief under 42 U.S.C. § 1983 which challenges the constitutionality of the University of Colorado's drug-testing program for intercollegiate student athletes, trainers, and cheerleaders. The University of Colorado is an institution of higher education established and maintained by the State of Colorado pursuant to COLO. CONST. art. VIII, § 5 and COLO. REV. STAT. § 23-20-101 *et seq.* (1988). In this class action, the American Civil Liberties Union (ACLU) claimed that the University's drug-testing program violated the Respondents' rights to be free from unreasonable searches and seizures under the Fourth Amendment and COLO. CONST. art. II, § 7.

At issue in this case is the University's ability to conduct urinalysis drug testing of its student athletes in order to preserve the integrity and fairness of athletic competition and to protect the health and safety of its students.

**The Context of Intercollegiate Athletics.**

The University of Colorado, as a member of the National Collegiate Athletic Association (NCAA) and the Big Eight Conference, is a sponsor of intercollegiate athletics and sports programs, including football, men's and women's basketball, men's and women's volleyball, cross-country, skiing, golf, and track and field. Three-quarters of the participants in the University's athletic programs are under 21; nearly all are under 24 (Tr. 182).

Through its athletic department, individual coaches, and trainers, the University prescribes detailed rules governing the activities of student athletes, both on and off field, and on and off campus. Student athletes recognize that the rules imposed by the University, and by the NCAA and Big Eight Conference, will substantially govern their lives during their participation in athletics, and agree to abide by these rules as a condition of participation (Tr. 166-69; Ex. 18). Student athletes understand that the benefits of athletic participation, present and future, greatly outweigh any personal inconvenience they must experience when they sign up for the team.

These regulations require athletes to maintain specified levels of academic performance and grade-point averages, to have their course selection and work monitored by academic counselors, and to attend mandatory study halls. Many athletes are required to maintain a certain weight and have their diets monitored at training tables. Training also requires curfews, mandatory practice and workout schedule , and abstinence from smoking, drinking, and drugs (Tr. 171-72). The regulation of such personal matters as diet, weight, sleep habits, fitness, and other activities is a routine aspect of a college athlete's life not shared by other students.

By its nature, participation in intercollegiate athletics involves close regulation and scrutiny of the physical fitness and bodily condition of student athletes. Because the entire focus of the activity is on the peak performance of the human body, athletes are subjected to frequent medical examinations to determine the condition of their bodies, both inside and out, so that the athletic department can determine their fitness to compete (Tr. 169, 510). In annual preseason physicals, athletes are subjected to intense physical examinations, and are required to submit blood and urine samples for testing (Tr. 26, 282, 507). Student athletes routinely exchange information about their physical condition with coaches and trainers. Consequently, any privacy interest in an athlete's medical problem is slight. When an athlete suffers an injury during practice or competition, the athlete's medical condtition is commonly reported by the media. A football player's groin pull may be more than a notation on the injury list, it may be a headline in the sports pages.

College athletes regularly submit to intimate physical contact which, in other contexts, would be regarded as offensive. During training, there is frequent touching for normal stretching and injury preventative taping (Tr. 37-38, 111-12). Football and basketball involve physical contact that in other settings would amount to battery.

The locker room environment of an intercollegiate athletic program involves an element of "communal undress" not present in other scholastic activities. It is common knowledge that athletes routinely undress and shower in front of each other and their coaches in same-sex locker rooms, and urinate in front of each other in a "common john" setting, in the case of men, or in stalls next to each other, in the case of women. Student athletes understand that athletic participation is not for the bashful or squeamish.

The setting and milieu of intercollegiate athletics leads to lowered expectations of privacy on the part of student athletes, when compared to the reasonable expectations of privacy held by other students, or even public employees. A prospective athlete who refuses to accept this reduction in privacy — such as one who refuses to shower with the team — will not last in the program.

**Drug Testing in the Context of Intercollegiate Sports.**

As a result of the widespread, publicized use of drugs by college and professional athletes, particularly the cocaine-related deaths of University of Maryland basketball player Len Bias and Cleveland Browns player Don Rogers, drug testing has become pervasive in professional and amateur athletics (Exs. 20, 25, 37). Drug testing is mandatory in the Olympics and most professional sports, and is required by the National Football League and Major League Baseball. Since 1986, the NCAA has required college athletes in post-season competition to submit to random urine testing (Tr. 50-51, 165; Exs. 13, 17).[1]

The proscribed drugs are harmful to the health and detrimental to the performance of athletes, and pose significant threats to athletes peculiar to competition at the intercollegiate level (Tr. 176-78, 513, 568, 576-601, 627, 644-58, 664). Anything that

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[1] These programs typically test for alcohol, amphetamines, barbiturates, cocaine, methaqualone, opiates, phencyclidine (PCP or "Angel Dust"), tetrahydrocannabinol (THC), marijuana, and performance-enhancing substances, including anabolic steroids (Ex. 17).

impairs or suppresses coordination, responses or reflex actions, or impairs judgment can result in injury (Tr. 511-14, 664; Exs. 20-21). For example, a drug-impaired skier going 85 m.p.h. risks death or serious injury (Tr. 176-77). Athletes using pain-killing drugs can endanger themselves by playing despite an injury. The risks from anabolic steroid use, although not as immediate, are just as severe: breakdown of the endocrine system, inflammation and tumors of the liver, ruptured tendons, myocardial infarction, hypertension, and hyperaggressiveness ("'roid rages") (Tr. 649-56; Exs. 23-24, 27). Anabolic steroids are used more frequently by college athletes than the rest of the population, as would be expected among a group under 22 in a highly competitive environment, where the pressure on an athlete to excel, in the hope of a lucrative professional career, is obvious (Tr. 658-62; Exs. 22, 26, 38).

Dr. Robert L. DuPont, former director of the National Institute on Drug Abuse, testified that urine testing is the only effective means of detecting drug use, and is the most effective means of deterring it. It is undisputed that drug-testing programs coupled with substantial sanctions for positive results significantly deter drug use in the college-age population (Tr. 753-77).

**The University of Colorado's Drug-Testing Program.**

As the trial court acknowledged, drug abuse is a significant national problem (Pet. App. C at 102a). Publicity given to incidents of drug abuse and violations of drug rules by student athletes has had a demoralizing effect on some college athletic programs and diluted the role of athletes as an example-setting group (Tr. 179, 382, 786). *See Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1320-21 (7th Cir. 1988) (taking judicial notice of these facts).

In response to publicized drug use by athletes, the University began its own drug-testing program during the 1984-1985 school year. The University instituted its program to prepare its athletes for drug testing in NCAA-sanctioned events, out of concern for athletes' health and safety, and to preserve the integrity of the

contests it sponsors and ensure the fairness of competition. The University's program was also instituted in response to the morale problems caused by drug use at other institutions (Tr. 179); its goal was to make sure that the kind of scandals involving banned drugs that tarnished other athlete role models did not occur at the University.

As originally implemented, the program required urinalysis for drugs at the athlete's annual physical, and called for regular urinalysis during the school year. All athletes were subject to random selection for testing, and were required to provide urine samples when their number was called. When an athlete received a confirmed positive test result, the program provided for counseling. The initial program imposed a one-week suspension from practice and competition for the second positive result, and a one-year suspension for the third; in 1986, the sanctions were stiffened to a one-year suspension for a first positive, and permanent suspension for the second (Exs. 5-6, 8). The initial program did not require the athlete to be monitored while providing the urine specimen (Ex. 5); for the 1986-1987 school year, the program was modified to require that the taking of the specimen be visually monitored (Ex. 6). Beginning with the 1987-1988 year, however, visual monitoring was dropped and the athlete was permitted to give a specimen in an enclosed collection area (Exs. 7-8).

During recruiting, and before deciding to attend the University on an athletic scholarship or with a view to participating in intercollegiate sports, student athletes were fully advised of the drug-testing program. In the case of "walk-ons" or others who consider participation in athletics after enrollment, the same briefing was given during the first visit with the coach. These prospective student athletes were informed that failure to consent to the program would result in denial of the opportunity to participate in intercollegiate athletics at the University

(Tr. 183-85, 287). All student athletes signed a written consent to drug testing (Ex. 9) which stated:

> I hereby acknowledge that I have received a copy of the University of Colorado Intercollegiate Athletics Drug Education Program. I further acknowledge that I have read said Program, that it has been outlined to me, that I fully understand the provisions of the Program and that I agree to voluntarily participate in the Program as described. I understand that I may choose not to sign this Form and forego participation in intercollegiate athletics at the University of Colorado.

Urine specimens were tested by state of the art, scientifically valid procedures. The University maintained confidentiality of test results (Tr. 294, 483; Exs. 5-8). Although it is possible to test a sample for irrelevant personal information such as use of birth control pills, this was never done (Tr. 483).

**The Trial Court Proceedings.**

Respondent David Derdeyn, a 31-year-old runner on the University's cross-country team, objected to the University's drug-testing program and, represented by the ACLU, filed a class action complaint in the District Court of the County of Boulder, State of Colorado, in October 1986. Consistent with the ACLU's nationwide agenda to stop college athletic drug testing, Respondents sought permanently to enjoin the University's drug-testing program as violative of their Fourth Amendment right to be free from "unreasonable searches and seizures", and to invalidate the consent obtained to the program "as being an unconstitutional condition of participation" in intercollegiate athletics.

After a week-long trial, the trial court ruled that the University's drug-testing program was an "unreasonable search" under the Fourth Amendment to the extent it involved suspicionless testing or even testing based on "reasonable suspicion". The court ruled the program unconstitutional in all formats, under both the Fourth Amendment and COLO. CONST. art. II, § 7. (Pet. App. C).

The trial court also held that the program was not validated by the voluntary consent of the participants, because consent to the drug-testing program was made a condition of participation in intercollegiate athletics, and was therefore void as an "unconstitutional condition":

> It is quite clear that no consent can be voluntary where the failure to consent results in a denial of the governmental benefit [Citations omitted.] . . . The evidence produced during this trial failed to establish that the consents given by the University's student athletes are voluntary. It is quite clear that they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent. (Pet App. C at 101a-102a).

The court enjoined further testing except upon "probable cause."

**The Rulings of the Colorado Court of Appeals and Colorado Supreme Court.**

The Colorado Court of Appeals affirmed the trial court's ruling that suspicionless urinalysis was an unreasonable search under the Fourth Amendment, and affirmed the trial court's conclusion that consent to testing had not been validly given. *Derdeyn v. University of Colorado,* 832 P.2d 1031 (Colo. App. 1991) (Pet. App. B). The consent ruling was upheld not on the "unconstitutional conditions doctrine", but rather as a determination of fact, based on several athletes' testimony that, "because of economic or other commitments the students had made to the University, they were not faced with an unfettered choice in regard to signing the consent." *Id.,* 832 P.2d at 1035 (Pet. App. B at 82a).

The Colorado Supreme Court granted the University's petition for certiorari and affirmed. *University of Colorado v. Derdeyn,* 863 P.2d 929 (Colo. 1993) (Pet. App. A). Balancing the privacy interests of student athletes against the interests asserted by the

University, the court held that the University's drug-testing program was an unreasonable search under the Fourth Amendment, because the University had not demonstrated a "compelling" state interest for its program, and because the interests of the University did not outweigh the privacy interests of the Respondents. Characterizing the intrusion on the Respondents' privacy interests as "significant", the court held that the University's corresponding interests in protecting the health and safety of its intercollegiate athletes, in promoting fair competition and the integrity of its athletic program, and in preventing drug use were all insignificant for Fourth Amendment purposes:

> We have not been persuaded that CU's athletes have a greatly diminished expectation of privacy, nor are we persuaded that CU's program is not significantly intrusive. In addition, we question whether some of the interests asserted by CU are even significant for Fourth Amendment purposes. For example, although the integrity of its athletic program is, like all the other interests asserted by CU, a valid and commendable one, it does not seem to be very significant for Fourth Amendment purposes. . . . Similarly, although the promotion of fair competition builds character in athletes and enhances the entertainment value of athletic events, CU does not explain why the promotion of fair competition is itself an important *governmental* interest, just as it does not explain why preventing the disqualification of its athletes at sporting events is an important *governmental* interest. [Emphasis original.]

*Id.*, 863 P.2d at 945-46 (Pet. App. A at 33a-34a).

The court also held that the Respondents had not given valid consent under the Fourth Amendment to the University's drug-testing program because their consent was coerced by the very circumstances under which it was obtained:

> It is clear from the record that a student will be denied the opportunity to participate in CU's intercollegiate athletic program in absence of execution of a signed consent. It is

> equally clear that no athletic scholarship will be available to a student who does not consent to drug testing. The pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing under such circumstances is obvious.

*Id.*, 863 P.2d at 949 (Pet. App. A at 40a). As for the "unconstitutional conditions doctrine" on which the trial court had relied, the court concluded that "The trial court unnecessarily addressed this issue." *Id.*, 863 P.2d at 950 n. 36 (Pet. App. A at 41a).

Two justices dissented. Chief Justice Rovira disagreed with the majority's conclusion that consent to drug testing was involuntary based on the evidence, finding that "the trial court must have relied on the unconstitutional conditions doctrine as support for its conclusion because only that legal finding logically could be applicable to both present and future student athletes." *University of Colorado v. Derdeyn*, 863 P.2d at 953 (Rovira, C.J., dissenting) (Pet. App. A at 47a-48a). Accordingly, Chief Justice Rovira would have both addressed the "unconstitutional conditions doctrine" and resolved it in the University's favor, because the value of the benefit of participation in intercollegiate athletics "does not outweigh the governmental interest in imposing the condition on its enjoyment." *Id.*, 863 P.2d at 957 (Pet. App. A at 55a-56a).

Justice Erickson dissented on this ground, and also dissented from the majority's decision that random drug testing was unreasonable under the Fourth Amendment. Disagreeing with the majority's characterization of the University's interests as insignificant, Justice Erickson wrote that the University's program "serves important and valid public interests, including protecting the health and safety of intercollegiate student athletes and preventing drug use by other students who look to student athletes as role models." *University of Colorado v. Derdeyn*, 863 P.2d at 960 (Erickson, J., dissenting) (Pet. App. A at 61a). Justice

Erickson also found the majority's conclusion that student athletes' privacy interests are not substantially diminished "implausible", noting that "[b]y its very nature, a locker room setting consists of communal undress, showering and urination." *Id.*, 863 P.2d at 961 (Pet. App. A at 64a-65a). "No other group is subject to routine physical examinations, submits to extensive regulation of their behavior, and encounters a communal locker room atmosphere on a routine basis." *Id.*, 863 P.2d at 962 (Pet. App. A at 65a). Finding that the Respondents' privacy interests did not outweigh the University's interests in preventing drug use and protecting its athletes' health and safety, Justice Erickson concluded that "the suspicionless drug testing of student athletes in this limited context is a reasonable search." *Id.*, 863 P.2d at 963 (Pet. App. A at 67a).

Petitioners' timely petition for rehearing was denied on December 6, 1993 (Pet. App. D).

## REASONS FOR GRANTING THE PETITION

### I. THE COLORADO SUPREME COURT HAS DECIDED A RECURRING AND IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW IN A MANNER THAT CONFLICTS WITH NUMEROUS APPELLATE RULINGS IN OTHER JURISDICTIONS.

All of the appellate courts that have addressed the constitutionality under the Fourth Amendment[2] of random, suspicionless drug testing of athletes have upheld such programs, with

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[2] The decision below is based upon, and repeatedly cites the Fourth Amendment. Although the Respondents also sought relief under Colo. Const. art. II, 7, the Colorado Supreme Court addressed this issue only tangentially:

> Furthermore, because the Colorado Constitution provides at least as much protection from unreasonable searches and seizures as does the Fourth Amendment, CU's drug-testing program is also unconstitutional under Article II, Section 7 of the Colorado Constitution.

*(footnote continues)*

the sole exception of the Colorado Supreme Court.[3] Federal courts that have weighed the governmental interests in drug testing of athletes against athletes' privacy expectations consistently have found the balance to favor the reasonableness of such programs.

In *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988), the Seventh Circuit observed that the extensive regulation of athletes' activities, their physical conditioning, the "communal undress" of the locker room, and the high visibility

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*(footnote continued)*

*University of Colorado v. Derdeyn*, 863 P.2d at 946 (Pet. App. A at 34a).

On the voluntariness of consent, the court held that "for the purposes of the Fourth Amendment and Article II, Section 7 of the Colorado Constitution, CU's intercollegiate student athletes do not voluntarily consent to being searched pursuant to the drug-testing program." *Id.*, 863 P.2d at 949-50 (Pet. App. A at 41a). The protection afforded by the state constitution is not further discussed; the court relied exclusively on federal decisions construing the Fourth Amendment and did not hold that the state constitution affords any greater rights than the Fourth Amendment.

Because the court held only that the state constitution "provides at least *as much* protection from unreasonable searches and seizures as does the Fourth Amendment" (emphasis added), the decision below does not rest on "adequate and independent state grounds," but, rather, "fairly appears to rest primarily on federal law, or to be interwoven with federal law," such that "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). *See Cohen v. Cowles Media Co.*, ___ U.S. ___, 115 L.Ed.2d 586, 595-96 (1991).

[3] See *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (high school athletes); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1987) (professional jockeys); *DiMeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc) (same); *O'Halloran v. University of Washington*, 679 F.Supp. 997 (W.D. Wash. 1988), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988) (college athletes); *Acton v. Vernonia School Dist. 47J*, 796 F.Supp. 1354 (D. Or. 1992) (high school athletes); *see also Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 26 Cal. Rptr.2d 834 (1994) (upholding college athletic drug testing program against challenge under state constitution privacy provision); *Bally v. Northeastern Univ.*, 403 Mass. 713, 532 N.E.2d 49 (1989) (upholding college athletic drug testing program under state civil rights law).

of drug testing in athletics, "makes it quite implausible that students competing for positions on an interscholastic athletic team would have strong expectations of privacy with respect to urine tests." *Id.*, 864 F.2d at 1319. The Third and Seventh Circuits reached the same conclusion with respect to professional athletes, and held that protecting the health and safety of athletes and ensuring the fairness of competition are unquestionably important state interests that outweigh whatever diminished privacy expectations athletes may have. *DiMeo v. Griffin*, 943 F.2d 679, 681-83 (7th Cir. 1991); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1987).

The district court in *O'Halloran v. University of Washington*, 679 F.Supp. 997, 1007 (W.D. Wash. 1988), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988), similarly concluded that "the larger interest of the health of the student-athlete as well as the public's and competing athletes' perception of the fairness of intercollegiate athletics greatly outweighs the relatively small compromise of an individual's privacy interest, which is diminished in the context of collegiate athletics." *See Acton v. Vernonia School Dist. 47J*, 796 F.Supp. 1354 (D. Or. 1992) (upholding against Fourth Amendment challenge a program of random drug testing of high school athletes).

The Colorado Supreme Court's decision is also at odds with the more recent ruling in *Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 26 Cal. Rptr.2d 834 (1994). There, in reviewing the ACLU's challenge to the same kind of random drug-testing program under state constitutional provisions comparable to the Fourth Amendment, the California Supreme Court reached exactly the opposite conclusion in balancing the privacy expectations of the athletes with the legitimate interests of the NCAA in conducting the testing:

> By its nature, sports competition demands highly disciplined physical activity conducted in accordance with a special set of social norms. Unlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and

> often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics.
>
> A student athlete's already diminished expectation of privacy is outweighed by the NCAA's legitimate regulatory objectives in conducting testing for proscribed drugs. As a sponsor and regulator of sporting events, the NCAA has self-evident interests in insuring fair and vigorous competition, as well as protecting the health and safety of student athletes. These interests justify a set of drug testing rules reasonably calculated to achieve drug-free athletic competition.

*Hill v. NCAA*, 7 Cal.4th at _____. In contrast to the court below, the California Supreme Court found that the NCAA's interests in promoting fair athletic competition and protecting the health and safety of student athletes were sufficiently "compelling" to outweigh whatever diminished privacy interests students claimed were infringed.

There is a sharp conflict between the decision of the Colorado Supreme Court and every other state and federal court that has balanced an athlete's privacy expectations against the athletic sponsor's legitimate interests in conducting drug testing.[4] The decision below is also impossible to reconcile with the long line of lower court decisions upholding suspicionless drug testing in the context of public employment, where the governmental interests are no greater than the University's interests here, and

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[4] Academic commentators who have reviewed this question have supported the constitutionality of drug testing in college athletics. *See, e.g.*, Ranney, *The Constitutionality of Drug Testing of College-Athletes: A Brandeis Brief for a Narrowly-Intrusive Approach*, 16 J.Coll. & Univ.L. 397 (1990); Johnson & Ritter, *The Legality of Testing Student Athletes for Drugs and the Unique Issue of Consent*, 66 Or.L.Rev. 895 (1987); Note, *Drugs, Athletes and the NCAA: A Proposed Rule for Mandatory Drug Testing in College Athletics*, 18 J.Marshall L.Rev. 205 (1985).

where the employees have much greater expectations of privacy than do college athletes.[5]

The Court should grant certiorari to resolve these conflicts in appellate authority because of the exceptional importance of the underlying issues to all of the people of the State of Colorado. If school officials in Colorado lack effective means to detect the illicit use of anabolic steroids and other performance-enhancing drugs, athletes have a greater incentive to use them. The integrity and fairness of athletic competition will suffer, both directly and as a matter of public perception. The success of drug prevention initiatives in the state will be undermined by drug use by college athletes who serve as role models for young people. *See Schaill,* 864 F.2d at 1320-21.

There is even more at stake than the integrity of college athletics. Most importantly, this ruling will place at risk the health of thousands of college athletes in Colorado, because they are the

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[5] *See, e.g., Transport Workers Union, Local 234 v. Southeastern Pa. Transp. Auth.*, 884 F.2d 709 (3rd Cir. 1989) (transit workers); *Tanks v. Greater Cleveland Regional Transit Auth.*, 930 F.2d 475 (6th Cir. 1991) (transit workers); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir. 1988) (nuclear plant workers); *Bluestein v. Skinner,* 908 F.2d 451 (9th Cir. 1990), *cert. denied,* 498 U.S. 1083 (1991) (private commercial aviation employees); *International Bhd. of Teamsters v. Dept. of Transp.*, 932 F.2d 1292 (9th Cir. 1991) (commercial truck drivers); *Jones v. Jenkins,* 878 F.2d 1476 (D.C. Cir. 1989) (school bus drivers); *National Fed'n of Fed. Employees v. Cheney,* 884 F.2d 603 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990) (aircraft workers and armed guards); *American Fed'n of Govt. Employees L-2110 v. Derwinski,* 777 F.Supp. 1493 (N.D. Cal. 1991) (health care professionals); *Amalgamated Transit Union, Div. 1279 v. Cambria County Transit Auth.*, 691 F.Supp. 898 (W.D. Pa. 1988) (bus drivers and mechanics); *Bailey v. Baytown,* 781 F.Supp. 1210 (S.D. Tex. 1991) (wastewater treatment workers); *Mullholland v. Department of Army,* 660 F.Supp. 1565 (E.D. Va. 1987) (aircraft workers); *Miller v. Vanderburgh County,* 610 N.E.2d 858 (Ind. App. 1993) (courthouse deputies); *Annapolis v. United Food & Comm'l Workers, Local 400,* 317 Md. 544, 565 A.2d 672 (1989) (police and firefighters); *O'Connor v. Police Comm'r,* 408 Mass. 324, 557 N.E.2d 1146 (1990) (police cadets); *Alverado v. Washington Pub. Power Supply Sys.*, 111 Wash.2d 424, 759 P.2d 427 (1988), *cert. denied,* 490 U.S. 1004 (1989) (nuclear plant workers).

ones who could be injured or killed if drug use goes undetected. It would be a terrible tragedy if even one student athlete is killed or seriously injured because the coaches were prevented from discovering his or her drug use by the decision of the court below. Plainly, the people of the State of Colorado should not be made to suffer these harmful consequences — all predicated on a misreading of the Fourth Amendment — without this Court's review.

This issue has already arisen in courts around the country and will continue to arise as the ACLU pursues its litigation campaign against drug-testing programs. State and federal courts will continue to be burdened with unnecessary uncertainty, and scarce resources of schools and universities will continue to be unnecessarily consumed, absent an authoritative ruling from this Court. Still worse, colleges, high schools, and amateur athletic organizations that may wish to implement their own drug-testing programs will be discouraged from doing so, deterred by the risk that their programs will be struck down as unconstitutional, and fearful of incurring massive legal expenses in court cases sponsored by a well-financed and litigious interest group such as the ACLU.

The issue of voluntary consent to drug testing is important not only for college athletic programs but also for employment testing and law enforcement generally. The University made a clear and overwhelming showing that consent to drug testing was voluntarily given: prospective athletes were allowed to review a consent form which was not signed until after the program had been explained to them, they were not threatened or coerced into signing the consent form, and were in no sense "required" to participate in intercollegiate athletics (Tr. 183-85). The Colorado Supreme Court's conclusion that student athletes were "coerced" merely because they "will be denied the opportunity to participate in [the University's] intercollegiate athletic program in absence of execution of a signed consent," *University of Colorado v. Derdeyn,* 863 P.2d at 949 (Pet. App. A at 40a), is at odds with this Court's decisions on coercion and consent. *See,*

*e.g., Florida v. Bostick,* ___ U.S. ___, 115 L.Ed.2d 389, 399 (1991); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).[6]

Finally, the Court should grant certiorari because of the Colorado Supreme Court's obvious misapprehension of this Court's pronouncements in *Skinner v. Railway Labor Executives Ass'n,* 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). The Colorado Supreme Court's evident confusion over the balancing of interests required by *Skinner* and *Von Raab* is demonstrated by the decision's conflict with every other state and federal decision on athletic drug testing, and by the conflicting majority and dissenting opinions within the decision itself. The decision below simply cannot be reconciled with the authoritative precedents of this Court.

## II. IN THE CONTEXT OF A COLLEGE ATHLETIC PROGRAM, SUSPICIONLESS DRUG TESTING IS CONSTITUTIONALLY REASONABLE.

In *Skinner v. Railway Labor Executives Ass'n,* 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989), this Court for the first time considered Fourth Amendment limitations on government drug testing in the absence of individualized suspicion. *Skinner* involved mandatory blood, breath, and urine testing of train crews and other employees involved in rail accidents; *Von Raab* involved urine testing of Customs Service employees directly involved in the interdiction of illegal drugs, who carried firearms, or had access to classified information. In both cases the tests were conducted without

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[6] As the dissenting Justices in the court below pointed out, the majority opinion is infected by an extremely broad and indefensible extension of the same "unconstitutional conditions doctrine" that tainted the trial court's decision. This Court has never suggested that consent is involuntary merely because the state offers a benefit in return, such as the privilege of competing in intercollegiate athletics. *See, e.g., Wyman v. James,* 400 U.S. 309 (1971); *Zap v. United States,* 328 U.S. 624 (1946), *vacated on other grounds,* 330 U.S. 800 (1947).

individualized suspicion; sanctions for positive tests were dismissal from employment, but positive results were not used for criminal prosecution.

In both cases, the Court held that "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner,* 489 U.S. at 624. *See Von Raab,* 489 U.S. at 667. To determine the reasonableness of the search, the Court found it necessary to "balance the public interest in the . . . testing program against the privacy concerns implicated by the test, without reference to [the] usual presumption in favor of" the requirement of individualized suspicion. *Von Raab,* 489 U.S. at 679.

*Skinner* found a compelling government interest in the need to detect and deter drug impairment by railroad employees engaged in safety-sensitive positions. The Court emphasized the legitimate need, for the testing program to provide an effective deterrent, to trigger the testing upon an event "which no employee can predict with certainty." *Id.,* 489 U.S. at 630. In *Von Raab,* the Court similarly concluded that the government had a valid public interest in maintaining the drug-free integrity of Customs employees.

In considering employees' privacy interests, Skinner noted that although it considered taking and testing blood and breath samples to be minimally intrusive, taking a urine specimen required the employee to perform an excretory function that implicated additional privacy concerns. Although the Court "would not characterize these additional privacy concerns as minimal in most contexts," *id.,* 489 U.S. at 626, they were reduced by the fact that samples were not taken "under direct observation of a monitor," but in circumstances similar to a "regular physical examination," *id.,* 489 U.S. at 626-27, and by the fact that the employees' expectations of privacy were diminished due to their "participation in an industry that is regulated

pervasively to ensure safety" and in which most employees were required to take "periodic physical examinations." *Id.*, 489 U.S. at 627.

In *Von Raab,* the Court observed that the privacy interests of the Customs employees were lessened to the extent that their duties depend on judgment and dexterity, giving the government a special interest in their "fitness and probity," so that employees "may expect intrusive inquiries into their physical fitness." *Id.*, 489 U.S. at 671. Privacy interests were also lessened because employees had notice that the testing would occur if they applied for promotions to the positions covered, *id.*, 489 U.S. at 672-73 n. 2, and because there was no direct observation of the act of urination. *Id.*

In the context of intercollegiate athletics, the important governmental interests served by a drug-testing program clearly outweigh student athletes' privacy interests. This is true not only because the governmental interests are of compelling importance, but also because college athletes' reasonable expectations of privacy are considerably diminished when compared with those of railroad workers, customs agents, bus drivers, and other public employees for whom suspicionless drug testing is constitutional. In giving undue weight to the privacy expectations of student athletes, and in disregarding the reduction of those interests by the very fact of participation in intercollegiate athletics, the Colorado Supreme Court has misconceived the legal principles laid down in *Skinner* and *Von Raab*.

The University's drug testing program was implemented to serve extremely important public interests. The University has a compelling interest protecting in the health and safety of students who participate in intercollegiate sports. The dangers to the health and safety of athletes in college-level competition who use performance-enhancing, mind-altering or pain-masking drugs are considerable, whether or not the athlete is actually impaired during practice or competition. The University also has

a strong interest in promoting fair competition in the intercollegiate athletics programs it sponsors. This benefits both the integrity of the competition itself, and the athletes who do not use drugs to gain an unfair advantage. As the California Supreme Court explained, a drug testing program implemented to ensure fairness of competition "provides significant direct benefits to the student athletes themselves, allowing them to concentrate on the merits of their athletic task without undue concern about loss of a competitive edge." *Hill v. NCAA,* 7 Cal.4th at ____.

These interests are especially compelling with regard to testing for anabolic steroids, which pose a serious threat to the health of athletes and the fairness of competition. The prevalence of the use of such drugs and the compulsion to use them was convincingly shown at trial (Tr. 649-56; Exs. 23-24, 27). Other courts that have addressed this issue have agreed that protecting the health and safety of athletes and ensuring the fairness of competition are unquestionably important interests. *See DiMeo v. Griffin,* 943 F.2d at 681-83; *see also Hill v. NCAA,* 7 Cal.4th at ____.

The drug testing program also serves compelling interests of the University's educational mission, both within and without the athletic department. The use of mind-altering and performance-enhancing drugs is a pervasive societal problem which threatens the nation's moral well-being. *See Harmon v. Thornburgh,* 878 F.2d 484, 497 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990) (Silberman, J., concurring). While widespread and publicized use of drugs by athletes is only part of the larger social problem, it is one which lies in the University's power to prevent. Those students who bear the University's standard in intercollegiate athletic competition become role models for other students and prospective students. When a student athlete is involved in a drug-related incident or injury, there is a serious negative effect on the University's educational mission. Deterring drug use among students who participate in intercollegiate athletics is unquestionably an important state interest. *Schaill,* 864 F.2d at

1321; *see also O'Halloran v. University of Washington,* 679 F.Supp. at 1007.

> "The student athlete is generally viewed by the broader community with admiration and respect." [Citation omitted.] Because of their high visibility and leadership roles, it is not unreasonable to single out athletes and cheerleaders for special attention with respect to drug usage. This court may take judicial notice of the fact that in the society at large drug usage by athletes is highly publicized and is a matter of great concern. Drug usage by this widely admired group is likely to affect the behavior of others and school authorities are within their discretion in conducting a program specifically directed at athletes.

*Schaill,* 864 F.2d at 1320.

The University's interest in protecting the health and safety of its athletes is not just "unquestionably significant," as the court below recognized, *University of Colorado v. Derdeyn,* 863 P.2d at 945 (Pet. App. A at 33a), it is clearly compelling, given the great potential for injury to drug-impaired athletes. The Colorado Supreme Court gave no consideration at all to the University's compelling interest in protecting student health and safety. *See Schaill,* 864 F.2d at 1321.

Just as the court below erred by unfairly deprecating the University's interests, it also erred in dismissing the University's argument that student athletes have greatly diminished privacy interests by virtue of their participation in intercollegiate athletics.

In weighing privacy interests, this Court applies an objective standard of reasonableness based upon "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987), quoting *United States v. Jacobson,* 466 U.S. 109, 113 (1984). *See California v. Greenwood,* 486 U.S. 35, 43-44 (1988). The physical condition of an athlete's body is the primary focus of intercollegiate athletics. Because competition in intercollegiate athletics is subject to a

unique set of demands, situations, rules and requirements, athletic participation carries with it social norms that effectively diminish the athletes' reasonable expectations of privacy in their bodily condition, both internal and external, and in their bodily processes. *See Hill v. NCAA,* 7 Cal.4th at ____.

The privacy interests implicated are in the act of urination, and in the information revealed by urinalysis. The court below has unduly exalted the claimed privacy interest in the act of urination itself. As Judge Posner correctly observed in *DiMeo v. Griffin,* 943 F.2d at 682:

> Urination is generally a private activity in our culture, though, for most, men, not highly private. Men urinate side by side in public restrooms without embarrassment even though there is usually very little, and often no, attempt to partition the urinals. In hospitals and physicians' offices, urine samples of both men and women are generally taken by female nurses or technicians under conditions of privacy similar to those prescribed by the [drug testing] rule.

The privacy interest in urination is even less significant where collection in a closed stall and aural monitoring are used to minimize any intrusion into privacy. *See Von Raab,* 489 U.S. at 661. Further, in the "common john" setting of college athletics, where communal undress, showering, and urination are the norm, any privacy interest in the act of urination is minimal: it is almost nonexistent.[7] The Colorado Supreme Court did not even consider this everyday aspect of athletes' lives.

Moreover, any expectation of privacy in the act of urination itself is greatly reduced by annual preseason physicals and routine physical examinations that student athletes undergo, in which urine specimens are taken for testing in circumstances very similar to those used in the University's drug testing program, and where, as Judge Posner puts it, athletes "expose their

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[7] In the context of a college athletic program, even visual monitoring has been found minimally intrusive. *O'Halloran v. University of Washington,* 679 F.Supp. at 1005.

most private parts to inspections, and are poked, squeezed, and kneaded in these and other private places." *DiMeo v. Griffin*, 943 F.2d at 682.

Although the court below discounted the evidence that athletes undergo frequent medical examinations, in which urine samples are collected in a manner similar to the University's program, and the corresponding effect on privacy, these exams are simply too familiar a feature of athletic participation to permit anyone to claim any significant expectation of privacy either in furnishing a urine sample or in what urinalysis might disclose. In the specific context of the University's athletic program, any objectively based expectation of privacy of an athlete in his or her body, including its fluids and wastes, is *de minimis*. *See DiMeo v. Griffin*.

The Colorado Supreme Court also discounted the impact of training rules and regimens on student athletes, finding it "doubtful" that athletes are extensively regulated as the University maintains. *University of Colorado v. Derdeyn*, 863 P.2d at 941 (Pet. App. A at 23a). This conclusion should seem strange to anyone having familiarity with college athletics. *See Hill v. NCAA*, 7 Cal.4th at ____ (Opinion of George, J., dissenting in part and concurring in part) ("by choosing to participate in a varsity sport, athletes invariably relinquish a great deal of privacy with regard to their physical condition and health"); *Acton v. Vernonia School Dist. 47J*, 796 F.Supp. at 1362 (noting "the diminished expectations that student athletes enjoy by the public nature of the events and by the existence of other regulations and restrictions").

As the Seventh Circuit observed in *Schaill*, all of these factors -- extensive regulation of daily activities, physical conditioning, "communal undress," and the high visibility of drug testing in athletics — establish that student athletes have diminished

expectations of privacy that do not outweigh the government's interest in ensuring that they remain drug-free:

> The combination of these factors makes it quite implausible that students competing for positions on an interscholastic athletic team would have strong expectations of privacy with respect to urine tests. For this reason, we believe that sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team.

*Id.*, 864 F.2d at 1319. *See DiMeo v. Griffin*, 943 F.2d at 682-83; *Shoemaker v. Handel*, 795 F.2d at 1142; *Hill v. NCAA*, 7 Cal.4th at ____; *O'Halloran v. University of Washington*, 679 F.Supp. at 1004-05.

The Colorado Supreme Court did not address other aspects of the University's drug-testing program which lessen its intrusiveness, such as advance notice of the program and the voluntary election to participate in athletics, see *Schaill*, 864 F.2d at 1320, and the limited discretion given to University officials to determine which athletes are tested. *See Skinner*, 489 U.S. at 622 n. 6; *Schaill*, 864 F.2d at 1321; *see also Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 454 (1990). The intrusiveness of the search is minimized even further when the testing is not only random but affects all athletes equally. As Dr. DuPont testified, it is less offensive for an athlete to hear "Your number came up and it's time to be tested" than it is to be pulled out of a line by someone saying, "You don't look right and we are going to test you." (Tr. 775). These aspects render the search less intrusive because they reduce to a minimum any "unsettling show of authority." *Von Raab*, 489 U.S. at 672 n. 2.

Given the diminished privacy expectations of those involved in an intercollegiate sports program, it is only minimally intrusive to collect a urine sample by aural monitoring in a closed stall at random times during the school year. In every other case involving school and professional athletics in which courts have weighed all the factors on the government and privacy sides of

the balance, drug testing without individualized suspicion has been approved. *See Schaill; Shoemaker v. Handel; DiMeo v. Griffin; Hill v. NCAA.* The court below gives no valid reason for distinguishing these other decisions which have upheld the reasonableness of suspicionless drug testing in the context of school and professional athletics. It is baffling that these decisions could find that athletes have diminished expectations of privacy, while the Colorado Supreme Court, assessing nearly identical facts, could find they do not.

The inexplicable outcome of the Colorado Supreme Court's balancing test betrays a misunderstanding of the legal principles articulated in this Court's prior decisions. The University's interests are at least as compelling as those acknowledged in *Skinner* and *Von Raab,* whereas the privacy interests of student athletes are even less than those of the employees in those cases. The decision below cannot be reconciled with these precedents.

## III. CONSENT TO DRUG TESTING MAY BE VALIDLY OBTAINED AS A CONDITION OF PARTICIPATION IN COLLEGE ATHLETICS.

The key Fourth Amendment issue is whether the allegedly "coerced" character of the consent, *i.e.*, that consent to testing is a condition of participation in athletics, negates the voluntariness of the consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). *See* Johnson & Ritter, *The Legality of Testing Student Athletes for Drugs and the Unique Issue of Consent*, 66 Or. L. Rev. 895, 920 (1987). If the consent is valid, *i.e.*, voluntary, then there is no right to object to drug testing. *Schneckloth,* 399 U.S. at 248-49; Johnson & Ritter, 66 Or. L. Rev. at 921.

In holding consent invalid, the court below relied exclusively on the following rationale:

> It is clear from the record that a student will be denied the opportunity to participate in CU's intercollegiate athletic program in absence of execution of a signed consent. It is equally clear that no athletic scholarship will be available to

> a student who does not consent to drug testing. The pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing under such circumstances is obvious.

*University of Colorado v. Derdeyn,* 863 P.2d at 949 (Pet. App. A at 40a). While labelled as a finding of fact, the court's ruling that student athletes are impermissibly "pressured" into giving consent because their refusal results in denial of the opportunity to participate in athletics is really a restatement of the same "unconstitutional conditions doctrine" on which the trial court relied. *See id.,* 863 P.2d at 964-65 (Pet. App. A at 69a-71a) (Erickson, J., dissenting).

This Court repeatedly has held that governmental benefits and entitlements far more significant than participation in college athletics can be conditioned on waiving the exercise of a constitutional right if the government's interest is sufficiently strong. *See, e.g., Zap v. United States*, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947); *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947); *Wyman v. James*, 400 U.S. 309 (1971); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). *Cf. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984); *South Dakota v. Neville*, 459 U.S. 553 (1983).

The Court has held that consent as a condition of a governmental benefit can be valid even where the intrusion on privacy interests is far greater than urine testing. In *Wyman v. James*, the Court considered a Fourth Amendment challenge to a home visitation program in which welfare recipients, as a condition of receiving payments, were required to permit a caseworker to inspect the inside of the recipient's home. Assuming there was a Fourth Amendment search, this Court held that consent to the search was a valid condition of a government benefit, because the beneficiary had the right to refuse the visit, and the consequence of refusal was not criminal prosecution but only cessation of financial aid. "The choice is entirely [the beneficiary's], and

nothing of constitutional magnitude is involved." *Id.*, 400 U.S. at 324.[8]

In holding that consent was "coerced", the court below failed to recognize that the opportunity to participate in intercollegiate athletics at a state university does not rise to the level of an entitlement, but, even more than the welfare payments in *Wyman*, is a gratuitous benefit. No one is required to try out, and no one who does is guaranteed a position on the team. For these reasons, courts repeatedly have held that, unlike the expectation of continued employment, or even of attending college, participation in athletics is not a constitutionally protected interest because there is no legitimate expectation of continued participation.[9]

Thus, consent to drug testing is not constitutionally invalid merely because it is a condition of athletic participation or because refusal to consent results in denial of that benefit, the sole rationale relied on by the Colorado Supreme Court. The

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[8] There are strong parallels between this case and *Wyman*. Neither the purpose of the home visitation in *Wyman* nor of the urinalysis here is to gather criminal evidence, but to ensure compliance with the requirements of the respective programs. In *Wyman*, the welfare recipient "received written notice several days in advance of the intended home visit," *id.*, 400 U.S. at 320; in the University's drug-testing program, the general notice of the program affords student athletes sufficient warning that they will be tested. Moreover, the benefit involved here is far less important than the welfare benefits involved in *Wyman*. The Colorado Supreme Court's attempt to distinguish *Wyman* fails to take these striking parallels into account. *See University of Colorado v. Derdeyn*, 863 P.2d at 950 n. 36 (Pet. App. A at 41a-43a).

[9] *E.g., Colorado Seminary (University of Denver) v. NCAA*, 570 F.2d 320 (10th Cir. 1978); *Bailey v. Truby*, 174 W.Va. 8, 321 S.E.2d 302, 314-15 (1984) and cases collected therein. *See* Johnson & Ritter, 66 Or.L.Rev. at 920; Comment, *Collegiate Athletic Participation: A Property or Liberty Interest?*, 15 Pac.L.J. 1203 (1984). *Cf. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it").

only remaining question is whether the University's program provides for voluntary, knowing, and intelligent consent.

Under the Fourth Amendment, the factors that determine whether consent to a search is voluntary include the age, intelligence, and education of the person consenting, the absence of improper promises, threats, or other overbearing conduct on the part of the person seeking consent, the absence of any misrepresentations about the purpose of the search, and knowledge of the purpose of the search. See *Schneckloth v. Bustamonte,* 412 U.S. at 226.

College students are old enough to give valid consent, *see* COLO. REV. STAT. § 13-22-101 (1987), and have enough intelligence and education to matriculate at the University. The undisputed record shows that there were no promises, threats, or other overbearing conduct by persons requesting consent to urine testing. There were no misrepresentations about the purpose of the search. Prospective athletes were given ample advance knowledge of the nature, scope, and purpose of the search, and of the rules against using prohibited drugs (Tr. 183-85, 287; Exs. 5-9). Based on these factors, there is overwhelming evidence that consent to the University's drug-testing program was voluntarily, knowingly, and thus validly given.

When the lack of actual coercion is considered along with the gratuitous nature of the government benefit involved, the reduced privacy expectations of college athletes, the detailed information about the program provided before consent is obtained, and the minimally intrusive nature of the tests, it is clear that the court below erred in holding the consents invalid as not being voluntarily given.[10]

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[10] The Colorado Supreme Court's ruling that the express written consent given in this case was involuntary — despite the advance notice and full information provided to student athletes, their age and experience, and the absence of any overbearing conduct — will have serious adverse consequences for application of the Fourth Amendment not only in colleges and schools, but also in the workplace and in law enforcement programs across

*(footnote continues)*

"The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation." *Florida v. Bostick,* 115 L.Ed.2d at 401. Consistent with the holdings of this Court in *Zap, Wyman,* and *Schneckloth,* the searches conducted under the University's testing program are valid because the students freely and voluntarily consent to them.

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*(footnote continued)*

Colorado. Many Fourth Amendment cases involve hurried and stressful communications between police or other government officials and members of the public subject to personalized suspicion. If the unpressured, informed, and advance consent given in this case does not pass constitutional muster, it is difficult to conceive of a situation in which consent will be upheld under the Fourth Amendment in Colorado courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 7, 1994

# APPENDICES

## APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 92SC86 November 1, 1993

UNIVERSITY OF COLORADO, Boulder, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; JUDITH ALBINO, as President of the University of Colorado, Boulder; and WILLIAM MAROLT, as Athletic Director, Department of Intercollegiate Athletics,

*Petitioners,*

*v.*

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Respondents.*

CERTIORARI TO THE COLORADO COURT OF APPEALS

EN BANC JUDGMENT AFFIRMED

[863 P.2d 929]

JUSTICE LOHR delivered the Opinion of the Court.
CHIEF JUSTICE ROVIRA dissents and JUSTICE ERICKSON joins in the dissent.
JUSTICE ERICKSON dissents and CHIEF JUSTICE ROVIRA joins in the dissent.

We granted certiorari in order to determine whether random, suspicionless urinalysis-drug-testing of intercollegiate student athletes by the University of Colorado, Boulder (CU), violates the Fourth Amendment to the United States Constitution[1] or

[1] Strictly speaking, the issue before us is whether the University of Colorado's drug-testing program violates the Fourth Amendment to the United States Constitution as made enforceable against the states through

*(footnote continues)*

Article II, Section 7, of the Colorado Constitution. Following a bench trial conducted in August of 1989 in which a class of current and prospective CU athletes challenged the constitutionality of CU's drug-testing program, the Boulder County District Court permanently enjoined CU from continuing its program. The trial court found that CU had not obtained voluntary consent from its athletes for such testing, and it declared such testing unconstitutional under both the federal and state constitutions. The Colorado Court of Appeals generally affirmed. *See Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo. App. 1991). We agree with the court of appeals, *see id.* at 1034-35, that in the absence of voluntary consents, CU's random, suspicionless urinalysis-drug-testing of student athletes violates the Fourth Amendment to the United States Constitution and Article II, Section 7, of the Colorado Constitution.[2] We further agree, *see id.* at 1035, that the record supports the finding of the trial court that CU failed to show that consents to such testing given by CU's athletes are voluntary for the purposes of those same constitutional provisions. Accordingly, we affirm the judgment of the court of appeals.

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*(footnote continued)*

the Due Process Clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

The parties have agreed that the University of Colorado, Boulder, is a state institution, and that the actions of the individual defendants constitute state action for all purposes relevant to this case.

[2] Recently, in *City and County of Denver v. Casados*, 862 P.2d 908 (Colo. 1993), we rejected a Fourth Amendment facial challenge to an Executive Order of the Mayor of the City and County of Denver establishing a program for mandatory blood- and urinalysis-drug-testing of city employees based on reasonable suspicion of alcohol or drug use or impairment. CU's program at issue here, in contrast, provides in some instances for random testing of intercollegiate student athletes without the necessity for suspicion, reasonable or otherwise, and in others for testing based on criteria that the trial court found to be incapable of indicating drug use to any degree.

## I.

CU began a drug-testing program in the fall of 1984 for its intercollegiate student athletes. CU has since amended its program in various ways, but throughout the existence of the program participation was mandatory in the sense that if an athlete did not sign a form consenting to random urinalysis pursuant to the program, the student was prohibited from participating in intercollegiate athletics at CU.[3]

CU's drug-testing program originally required a urine test for certain proscribed drugs[4] at each intercollegiate athlete's annual physical and also required random urine tests thereafter. Counseling was mandated following a first positive result. The penalty for a second positive included a seven-day suspension from participation in intercollegiate athletics, and the penalty for a third positive included a minimum one-year suspension. No specific monitoring procedures were prescribed for the collection of the urine samples, and two students testified that during this phase of the program they were not monitored during the act of urination. According to CU's 1984 Form[5] describing the program, all test[6] results were sent to the "Team Physician." The intercollegiate student athletes also were required to give their consent to releasing test results to

> the Head Athletic Trainer at [CU]; my parent(s) or legal guardian(s) or spouse; the head coach of any intercollegiate sport in which I am a team member; the Athletic Director of

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[3] In written descriptions, CU itself has always characterized its drug-testing program as "a mandatory program of drug education, testing, and counseling/rehabilitation."

[4] The proscribed drugs as specified by CU in its 1984 form entitled "UNIVERSITY OF COLORADO INTERCOLLEGIATE ATHLETICS DRUG EDUCATION PROGRAM" (the 1984 Form) were amphetamines, barbiturates, cocaine, methaqualudes, opiates, morphine, codeine, PCP (angel dust) and analogues, and tetrahydrocannabinol (THC or marijuana).

[5] *See supra* note 4.

[6] Testing was performed by an independent, commercial laboratory.

> [CU]; and the Drug Counseling Program at the Wardenburg Student Health Center.

The 1984 Form gave no general or specific assurances of confidentiality.

Sometime thereafter,[7] CU amended its program for the first time. The penalty for a first positive was changed to include suspension for "the current competitive season," and the penalty for a second positive was changed to include permanent suspension from "any activity sponsored by the University of Colorado Athletic Department." Following a first positive, the athlete was also required successfully to complete a substance abuse rehabilitation program as a condition for further participation in intercollegiate athletics. The first amended program also provided that the "collection of the specimen will be observed [sic], and the athlete may be asked to disrobe in order to protect the integrity of the testing procedure."[8] Test results were still sent to

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[7] CU amended its original program three times, and the third amendment became effective on August 14, 1988. An official from CU testified that the program was reviewed annually in order to determine if changes in the program should be made. However, with the exception of the third amended program, the record is unclear on when, exactly, the amended program took effect.

[8] One male student athlete testified that during this phase of the program the trainer would hand you a bottle, a screw cap bottle and you and the trainer would adjourn to a restroom where the trainer would physically observe you filling up the bottle with your urine.

. . .

> I mean that the trainer would actually watch you urinate, you weren't allowed to turn your back, talking about full frontal exposure of your body.

A female student athlete testified:

> Some female trainer had to be in the restroom watching you, in the actual stall watching you while you went to the bathroom.

Another female student athlete testified:

> You came into the track office and the trainer would come in and post all the peoples' names that were on the team.

*(footnote continues)*

the "Team Physician," but following a first positive, the first amended program stated:

> [T]he Team Physician will inform the Head Athletic Trainer. The Head Athletic Trainer will advise the Athletic Director. The Athletic Director will notify the athlete's Head Coach(es). Additionally, the athlete will be required to . . . participate in a conference telephone call between the athlete, his/her parent(s) or legal guardian(s) of the positive test results.

CU still gave no general or specific assurances of confidentiality of test results.

CU's second amended program changed the penalty for a first positive from suspension for "the current competitive season," to suspension for "a twelve month period." In all other relevant respects the program remained unaltered.

CU's third amended program, which became effective August 14, 1988, contained numerous changes. First, it added alcohol, "over-the-counter drugs," and "performance-enhancing substances such as anabolic steroids" to the list of drugs for which students could be tested. Second, the term "athlete" was defined to include "all student participants in recognized intercollegiate sports, including but not limited to student athletes, cheerleaders, student trainers and student managers." Third, random

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*(footnote continued)*

. . .

That is what we called it, after a while, "the pee team". You kind of got flippant about it after a while because it was so embarrassing and everybody had to do it so we made jokes about it so that, you know, it wouldn't be as bad. Then, you would go into the bathroom with one of the trainers because at that time the training room was in the track office so you got one of the trainers and you went to the bathroom and she gave you a coke cup and you peed in the cup with the door open so she could watch and then you take your urine sample and you pour it in the bottle and screw the bottle up and she writes your number or whatever on it and then takes it away.

"rapid eye examination (REE)" testing was substituted for random urinalysis, and a urinalysis was performed only after a "finding of reasonable suspicion that an athlete has used drugs," and at the athlete's annual physical examination. Failure to perform adequately on an REE was considered "*prima facie* reasonable suspicion of drug use [except with regard to steroids]," and the student was required to provide a urine specimen for testing purposes if the student did not perform adequately on the REE. In addition, if a student exhibited "physical or behavioral characteristics indicating drug use including, but not limited to: tardiness, absenteeism, poor heath [sic] habits, emotional swings, unexplained performance changes, and/or excessive aggressiveness," this was also considered reasonable suspicion of drug use, and the student was required to take a urine test. Fourth, urine samples were to be collected "within the Athletic Department facilities," and athletes were "directed to provide a urine specimen in a private and enclosed area" while a monitor remained outside. The monitor would then receive "the sample from the athlete and check[ ] the sample for appropriate color, temperature, specific gravity and other properties to determine that no substitution or tampering has occurred." Fifth, the athletes were required to give their consent to releasing test results to

> the Head Athletic Trainer at [CU]; my parent(s) or legal guardian(s), if I am under the age of 21; the head coach of any intercollegiate sport in which I am a team member; the Athletic Director of [CU]; my work supervisor (if applicable) and the Drug Counseling Program at the Wardenburg Student Health Center.

Finally, although CU still gave no general assurances of confidentiality, it did specify in its third amended program that communications between an athlete and physicians at Wardenburg Student Health Center would be confidential. In October of 1986, intercollegiate student athletes at CU filed a class action

suit[9] in Boulder County District Court challenging the constitutionality of the drug-testing program as it then existed and seeking declaratory and injunctive relief.[10] Named as defendants were CU, the board of regents of CU, Judith Albino as president of CU, and William Marolt as athletic director, department of intercollegiate athletics. When CU subsequently amended its program, an issue arose as to which version of CU's program, if any, could be challenged at trial. CU argued that the case was moot because it "would be futile to discuss the merits of drug-testing policy the University has no intention of reinstating." However, by minute order, the trial court found that CU and the other defendants have "refused to agree that they will not return to the policy which was initially challenged in this class action. In fact, defendants have indicated that there are circumstances under which they would return to that policy." The trial court concluded "[t]herefore, . . . the legality of [CU's] prior drug-testing policy is not moot," and it noted that it had "previously ruled that plaintiffs are to amend the complaint to add allegations concerning the new policy." The plaintiffs filed their

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[9] A class was certified by stipulation on January 27, 1987. The class consists of:

> Those present and prospective undergraduate student athletes who are or will be subject to the University of Colorado intercollegiate athletic department's drug education program as a condition of participation in the University of Colorado intercollegiate athletic program limited as follows: Those present undergraduate student athletes who have never tested positive or have been subject to discipline or sanction as a result of a positive test result; and those present student athletes who, although having executed waivers, consents or agreements to participate in the University of Colorado's drug education program, object to the program as being an unconstitutional condition of participation; and lastly, those prospective undergraduate student athletes who will execute waivers, consents or agreements to participate in the University of Colorado's drug education program, but who object to the program as being an unconstitutional condition of participation.

[10] Based on allegations in the plaintiffs' complaint, the then existing program was the first amended program, according to which students were directly observed during the act of urination and the penalty for a first positive included suspension for the current competitive season.

amended complaint on March 16, 1989, the same day that the trial court signed the minute order. In their amended complaint, the plaintiffs sought relief from CU's random drug-testing programs, past, present, and future. Accordingly, at issue in the ensuing trial was the constitutionality of every version of CU's drug-testing program.

Following a bench trial conducted in August of 1989, the trial court entered its written findings of fact, conclusions of law, and order and judgment. The trial court found that "[o]btaining a monitored urine sample is a substantial invasion of privacy." It found that the

> REE does not function, if any sense, as "reasonable suspicion" of drug use. Because of its disastrous ability to predict drug use, it functions more as an avenue to inject arbitrary judgments into an otherwise random selection of students for testing.

Similarly, it found that "[l]ike the REE, the [other] reasonable suspicion criteria [as set forth by CU] are incapable of indicating drug use to *any* degree" (emphasis in original). The trial court also found that while

> the University labels the program as "Drug Education Program", there is little education . . . . There is no ongoing educational component of the program. Testing is clearly its major focus.

Finally, the trial court found that there

> is no evidence that the University instituted its program in response to any actual drug abuse problem among its student athletes. There is no evidence that any person has ever been injured in any way because of the use of drugs by a student athlete while practicing or playing a sport.

The trial court explained that the governmental interests asserted by CU in favor of its program were "compliance with NCAA required tests, a concern for the students' health and

safety, and a need to promote fair competition." Although the trial court agreed that the goals embodied by these interests were commendable and valid, the trial court ruled that under *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989),[11] and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989),[12] they were not sufficiently compelling as

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[11] In *Skinner*, the United States Supreme Court upheld suspicionless blood- and urinalysis-drug-testing of railroad employees involved in certain types of train accidents. *Id.* at 609, 634. Such testing was mandated by regulations promulgated by the Federal Railroad Administration under the authority of the Federal Railroad Safety Act of 1970, 84 Stat. 971, 45 U.S.C. § 431(1). *Skinner*, 489 U.S. at 606. The Court found that the government's interest in suspicionless testing of "railroad employees engaged in safety-sensitive tasks," *id.* at 633, was "compelling," *id.* at 628, 633, because employees "subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences," *id.* at 628. On the other hand, the Court found that such employees had diminished expectations of privacy for the purposes of the Fourth Amendment because they "participat[ed] in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.* at 627. Noting also that the regulations in question "do not require that [urine] samples be furnished under the direct observation of a monitor," *id.* at 626, the Court concluded that the suspicionless searches were reasonable under the Fourth Amendment because "the Government's compelling interests outweigh[ed the employees'] privacy concerns," *id.* at 633.

[12] In *Von Raab*, the United States Supreme Court upheld suspicionless urinalysis-drug-testing of United States Customs Service employees seeking transfer or promotion to positions in which they would be directly involved in the interdiction of illegal drugs, or would be required to carry firearms or to handle classified information that is truly sensitive. *Id.* at 659, 677-79. The Court found that the government's interest in the suspicionless testing of such employees was "compelling," *id.* at 672, 674, 677, "[i]n light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances," *id.* at 674, or the handling of truly sensitive, classified information, *id.* at 677. On the other hand, the Court found that such employees had diminished expectations of privacy for the purposes of the Fourth Amendment because "[u]nlike most private citizens or government employees in general, employees involved

*(footnote continues)*

governmental interests to outweigh an intrusion on the reasonable privacy expectations of students that is "clearly significant." Therefore, the trial court concluded, CU's random urinalysis-drug-testing of athletes without individualized suspicion violates the Fourth Amendment's guarantee that persons shall be secure against unreasonable searches and seizures conducted by the government. The trial court also held that "[n]o intrusion, however slight, can be deemed 'reasonable' for purposes of the Fourth Amendment where the intrusion will not and cannot reveal the information sought," and that therefore, the "rapid eye exam is an unconstitutional intrusion under the 'reasonableness' standard of the Fourth Amendment." Similarly, because it found that the other reasonable suspicion criteria relied upon by CU were incapable of indicating drug use to any degree, the trial court held that "failure makes 'unreasonable' [under the Fourth Amendment] any search [e.g., urinalysis] conducted pursuant to those criteria." [13]

The fact that CU's athletes signed forms consenting to random drug testing did not alter the trial court's conclusion. Rather, the trial court found that CU failed to demonstrate that the consents given by the athletes were voluntary, and also held that "no

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*(footnote continued)*

in drug interdiction reasonably should expect effective inquiry into their fitness and probity," *id.* at 672, and "[m]uch the same is true of employees who are required to carry firearms," *id.*, or who are already subject to background investigations because of their access to government secrets, *id.* at 677-78. The Court concluded that the suspicionless searches were reasonable under the Fourth Amendment because the "Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions," *id.* at 679, although the Court remanded for further factual determinations on the issue of which employees are likely to gain access to "truly sensitive information," *id.* at 677, 679.

[13] For somewhat different reasons, the trial court also held that CU's random urine and REE testing, as well as its urine testing based on "reasonable suspicion" generated by REE testing or other stated criteria, violated Article II, Section 7, of the Colorado Constitution.

consent can be voluntary where the failure to consent results in a denial of the governmental benefit."

On these bases, the trial court declared that CU's drug-testing program was unconstitutional. It permanently enjoined CU from "requiring any urine samples from student athletes for the purposes of drug testing, whether those tests occur on a random basis or as a result of the 'reasonable suspicion' criteria stated," and it permanently enjoined CU from "requiring student athletes participation in the Rapid Eye Exam procedure." In addition, the trial court held that "reasonable suspicion" is not the appropriate standard to warrant urinalysis-drug-testing of athletes by CU, and that such testing is impermissible absent probable cause under either the Fourth Amendment or Article II, Section 7, of the Colorado Constitution.

The Colorado Court of Appeals generally affirmed. *See Derdeyn,* 832 P.2d 1031. The court of appeals explained that CU did not appeal the trial court's findings relating to the REE, but only those relating to urinalysis. *Id.* at 1033. It held in part II of its opinion that CU's urine testing program was unconstitutional under the Fourth Amendment and under Article II, Section 7, of the Colorado Constitution, *id.* at 1035, and it affirmed the trial court's permanent injunction prohibiting CU from testing its athletes pursuant to its original program or any of its amended programs, *id.* In addition, although the court of appeals did not disturb the trial court's finding that CU's stated "reasonable suspicion" criteria were wholly ineffective, or the trial court's ruling that mandatory urinalysis based upon such criteria is unconstitutional, it held in part IV of its opinion that objective, reasonable, individualized suspicion of drug use could in some circumstances warrant mandatory drug testing of intercollegiate athletes by CU. *Id.*[14] Accordingly, the court of appeals reversed

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[14] It is not perfectly clear whether the court of appeals based this holding in part IV only on the Fourth Amendment, or whether it based it on the Fourth Amendment and Article II, Section 7, of the Colorado Constitution. On the one hand, the court of appeals cites only two cases in

*(footnote continues)*

the order of the trial court only insofar as it prohibited all testing not premised on probable cause. *Id.* at 1035-36.

We granted CU's petition for writ of certiorari on the following issues:

> In the context of the University's drug-testing program, is suspicionless drug testing constitutionally reasonable?
>
> Can student athletes give valid consent to the University's drug-testing program if their consent is a condition of participation in intercollegiate athletics at the University?

We hold that in the absence of voluntary consents, CU's random, suspicionless urinalysis-drug-testing of student athletes violates the Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution. *See*

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*(footnote continued)*

support of this holding, specifically, *In re P.E.A.*, 754 P.2d 382 (Colo. 1988) (search of a public high school student's car was not unconstitutional), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of a public high school student's purse did not violate Fourth Amendment standard of reasonableness). Furthermore, *P.E.A.* never cites or refers to the Colorado Constitution; it relies very heavily on *T.L.O.*, and it states that "[t]he focal issue in this case is whether P.E.A.'s fourth amendment rights were violated when school officials questioned and searched him . . . ." *P.E.A.*, 754 P.2d at 386. Thus it seems that the court of appeals did not base its holding in part IV on the Colorado Constitution.

On the other hand, in part II of its opinion, the court of appeals acknowledges that "in some instances, [Article II, Section 7,] may protect against invasions that the federal constitution would not prohibit." *Derdeyn*, 832 P.2d at 1035. Furthermore, because the court of appeals holds in part II that CU's urine testing program is unconstitutional under the Colorado Constitution, one might expect the court of appeals to reach in part IV of its opinion the issue whether, under the Colorado Constitution, probable cause is required as a premise for urinalysis-drug-testing by CU.

On balance, and especially in light of the authority cited by the court of appeals in part IV, we think the more plausible reading is that the court of appeals did not reach the issue of whether, under the Colorado Constitution, probable cause is required as a premise for urinalysis-drug-testing by CU.

*infra* part IIA.[15] We further hold that the record supports the trial court's finding that CU failed to show that its athletes consent voluntarily to its drug-testing program. *See infra* part IIB. Finally, because we granted certiorari on the issue of whether, in the context of CU's drug-testing program, *suspicionless* drug-testing is constitutionally reasonable, and not on the issue of whether reasonable suspicion is ever a sufficient predicate to mandatory urinalysis-drug-testing of athletes by CU, and because the parties have briefed the former but not the latter issue, we express no opinion on the latter issue under either the federal or the state constitution.

## II

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches conducted by the government, *Von Raab,* 489 U.S. at 665, even when the government acts as the administrator of an athletic program in a state school or university. *See Schaill ex rel. Kross* v. *Tippecanoe County Sch. Corp.,* 864 F.2d 1309 (7th Cir. 1989); *Brooks v. East Chambers Consol. Indep. Sch. Dist.,* 730 F.Supp. 759 (S.D. Tex 1989); *cf. New Jersey v. T.L.O.,* 469 U.S. 325, 333-37 (1985) (holding that the Fourth Amendment prohibits unreasonable searches

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[15] At oral argument, CU requested that we review the program that was in effect at the time that the trial court issued its permanent injunction, except that we should ignore the REE component of that program. In other words, CU requested that we limit our review to only the third amended program, absent the REE component. We decline to do so for two reasons. First, the REE was an integral component of the third amended program, and so it is impossible to be precise about what, exactly, that program would be without the REE component. Second, as the trial court found, CU, in effect, has reserved a right to return to any of the drug-testing procedures that it used in its earlier programs. For that reason, the trial court reviewed all of CU's programs that preceded the trial. Our review is similarly broad, absent, of course, any consideration of REE. In other words, we review in this opinion random, suspicionless urinalysis-drug-testing by CU of student athletes as that testing has been conducted pursuant to any of CU's drug-testing programs to the date of trial.

and seizures conducted by public school officials acting as civil authorities). Furthermore,

> [b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, . . . these intrusions must be deemed searches under the Fourth Amendment.
>
> *Skinner,* 489 U.S. at 617 (footnote omitted). It follows that CU's urinalysis-drug-testing program must meet the reasonableness requirement of the Fourth Amendment.

A search must usually be supported by a warrant issued upon probable cause. *Von Raab,* 489 U.S. 665. However, neither a warrant, nor probable cause, nor any measure of individualized suspicion is an indispensable component of reasonableness in every circumstance. *Id.; Skinner,* 489 U.S. at 618-24. Rather,

> where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.
>
> *Von Raab*, 489 U.S. at 665-66.

It is clear that CU's drug-testing program is not designed to serve the ordinary needs of law enforcement. We must therefore balance individual student athletes' privacy expectations against CU's governmental interests to determine whether CU's random, warrantless, suspicionless urinalysis-drug-testing program is unreasonable under the Fourth Amendment. *See Skinner,* 489 U.S., at 619 ("What is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" and "[t]hus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'") (quoting *United States v.*

*Montoya de Hernandez,* 473 U.S. 531, 537 (1985), and *Delaware v. Prouse,* 440 U.S. 648, 654 (1979)); *T.L.O.,* 469 U.S. at 337 ("Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'") (quoting *Camara v. Municipal Court of San Francisco,* 387 U.S. 523, 537 (1967)); *International Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n (NRC),* 966 F.2d 521, 525 (9th Cir. 1992); *Dimeo v. Griffin,* 943 F.2d 679, 681 (7th Cir. 1991) (en banc); *National Fed'n of Fed. Employees* v. *Cheney,* 884 F.2d 603, 608 (D.C. Cir. 1989).

CU advances alternative theories to support its claim that its drug-testing program is reasonable under the Fourth Amendment. First, CU argues that its drug-testing program is reasonable under the Fourth Amendment because the student athletes' diminished expectations or privacy and the compelling governmental interests served by the program. Second, CU argues that even if its drug-testing program is not otherwise constitutionally reasonable, there is no constitutional violation because its student athletes voluntarily consent to testing. We address these arguments in turn.

## A

CU argues that its drug-testing program is reasonable under the Fourth Amendment because the student athletes' diminished expectations of privacy and the compelling governmental interests served by the program. We therefore consider in turn (1) the degree to which CU's drug-testing program intrudes on the reasonable expectations of privacy of student athletes and (2) the magnitude of the governmental interests served by the program. We then balance these factors in order to determine whether CU's drug-testing program is reasonable under the Fourth Amendment.

1

Although nonvoluntary, random, suspicionless urinalysis-drug-testing by the government always intrudes on an individual's Fourth Amendment privacy interests, the magnitude of that intrusion can vary from context to context. *See Von Raab,* 489 U.S. at 671 ("The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances."). Some of the factors that courts have taken into account in determining the magnitude of such intrusions include the particular place and manner in which the urine sample is collected, *Skinner,* 489 U.S. at 626-27; *Schaill,* 864 F.2d at 1318, whether the individual participates "in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees," *Skinner,* 489 U.S. at 627, the operational realities of the workplace in which an individual is subjected to drug testing, *Von Raab,* 489 U.S. at 671, whether the individual "for whatever reason [is] subject to frequent medical examinations," *Dimeo,* 943 F.2d at 682, and the consequences of refusing to give a urine sample, *Schaill,* 864 F.2d at 1319-20. CU asserts in its brief that the magnitude of the intrusion of its drug-testing program on its athletes is minimal for a variety of reasons. Specifically, CU asserts that (a) collection of the urine sample in a closed stall with aural monitoring minimizes any intrusion. CU also asserts that student athletes' expectations of privacy with regard to urinalysis are diminished because (b) they routinely give urine samples as part of annual, general medical examinations; because (c) they submit to extensive regulation of their on- and off-campus behavior, including maintenance of required levels of academic performance, monitoring of course selection, training rules, mandatory practice sessions, diet restrictions, attendance at study halls, curfews, and prohibitions on alcohol and drug use; because (d) they must submit to the NCAA's random urinalysis-drug-testing program as a condition of participating in NCAA competition; because (e) the consequences of refusing to provide a urine sample are not severe; and because

(f) positive test results are confidential and are not used for the purposes of criminal law enforcement.[16]

We consider each of these assertions in the order stated. As a preliminary matter, however, we note two things. First, in support of these assertions, CU cites various exhibits and testimony contained in the record, all of which were originally presented in full to the trial court for its consideration, and CU had an opportunity during closing argument to stress the significance of this evidence of its case. In addition, the trial court heard testimony from several intercollegiate student athletes about what it is like to be a student athlete, and about what it is like to be tested, without individualized suspicion, for possible drug abuse, in CU's random urinalysis-drug-testing program. On the basis of all the evidence before it, the trial court found that "[o]btaining a monitored urine sample is a substantial invasion of privacy," and that CU's random, suspicionless urinalysis-drug-testing of athletes is an "intrusion [that] is clearly significant."[17]

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[16] CU also asserts that student athletes have a diminished expectation of privacy with regard to the drug-testing program because they give their consent to the program by signing consent forms that give them full notice of the program. As the trial court found, however, such consents are not voluntary. We recognize that in *Schaill*, 864 F.2d at 1319-20, the court reasoned that even if such a consent is not voluntary, the fact that a student signs a form giving consent significantly diminishes the subjective intrusiveness or urine testing, but we disagree with this analysis. In our view, once it has been determined that an individual's consent to a drug-testing program is not voluntary for the purposes of the Fourth Amendment, the fact that the government has extracted consent from the individual does not demonstrate that the individual has a diminished expectation of privacy with regard to the program. On the contrary, it shows that the program intrudes on an individual's privacy interest.

[17] The trial court did not elaborate on these findings, except to say:

> Elimination of [urine] is a private matter and students subjected to direct observation are very embarrassed and uncomfortable and feel as though their privacy has been invaded. They are resentful that they must be required to prove that they are abiding by the University's

*(footnote continues)*

We are unaware of any case that holds that the determination of the magnitude of the intrusion of a drug-testing program on the privacy interests of individuals is a factual issue for the trial court to which appellate courts must defer. On the other hand, such a determination, while not a pure question of fact, is certainly one that is dependent upon many facts that can vary from case to case, and therefore a trial court is especially well positioned to assess the magnitude of an intrusion of a drug-testing program on the reasonable privacy expectations of an individual. We therefore owe respectful attention to the trial court's findings and conclusions in this case, and its findings and conclusions in no way support CU's assertion that its drug-testing program does not significantly intrude on the privacy interests of intercollegiate student athletes.

Second, it cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment. *See Morales v. Grigel,* 422 F.Supp. 988, 997, 998 (D.N.H. 1976) (stating that a "college cannot, in this day and age, protect students under the aegis of in *loco parentis* authority from the rigors of society's rules and laws, just as it cannot, under the same aegis, deprive students of their constitutional rights," and holding that a warrantless search of a student's dormitory room for stolen goods violated the Fourth Amendment even though the purpose of the search was not to obtain criminal evidence); *Collier v. Miller,* 414 F.Supp. 1357, 1359, 1367, 1367 n. 11 (S.D. Tex. 1976) (holding unconstitutional a random search, without probable cause, of a Houston University student's purse for alcoholic beverages, bottles, or weapons, as she entered a university pavilion for a rock concert, and explaining that "[t]he defendants do not argue in their brief that a different Fourth Amendment standard should apply to schools, nor would this Court find such

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*(footnote continued)*

rule against drug use. While the University does not request information other than the presence of the proscribed drugs from the laboratory, urine can reveal a whole host of other personal information such as use of birth control pills.

an argument meritorious."); *Smyth v. Lubbers,* 398 F.Supp. 777, 786 (W.D. Mich. 1975) (holding that adult college students have the same interest in the privacy of their rooms as any adult has in the privacy of his home); 4 Wayne R. LaFave, *Search and Seizure,* ¶10.11(a), at 161-62 (2d ed. 1987) ("Courts have quite properly declined to rely upon the in loco parentis theory in assessing searches conducted on college campuses."); *id.* ¶10.11(c), at 178, 180 ("The reported cases dealing with searches upon college and university campuses reflect the fact that these searches are generally of a different nature than those occurring in high schools," and "it is abundantly clear that there is no basis consistent with established Fourth Amendment doctrine upon which to uphold these [college] searches when made upon less than a full showing of probable cause."); *cf. T.L.O.,* 469 U.S. at 336-37 ("In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."). Indeed, we note that the representative plaintiff in this case, at the time of trial, was a thirty-one-year-old Army veteran who had served honorably in Europe and Iran,[18] and who had been a member of CU's track and field and cross-country teams in 1986, 1987, and 1988. We therefore find of only marginal relevance holdings by other courts that high school student athletes have a diminished expectation of privacy under the Fourth Amendment, *cf. Schaill,* 864 F.2d at 1319 (concluding that it is "quite implausible that students competing for positions on [a high-school] interscholastic athletic team would have strong expectations of privacy with respect to urine tests"), and we are persuaded that cases that analyze the Fourth Amendment rights of adults in a workplace environment are much more instructive than cases such as *T.L.O.,* 469 U.S. 325, *In re P.E.A.,* 754 P.2d 382 (Colo. 1988) (search of a public high school student's car was not

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[18] C.R.C.P. 23(a) ("Class Actions") provides that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all only if . . . the claims . . . of the representative parties are typical of the claims . . . of the class."

unconstitutional), and *Acton v. Vernonia Sch. Dist. 47J,* 796 F.Supp. 1354 (D. Or. 1992) (rural public high school's random urinalysis-drug-testing of interscholastic athletes was not unconstitutional), which analyze the Fourth Amendment rights of high school students.[19]

With these two things in mind, we now consider CU's arguments that the magnitude of the intrusion of its drug-testing program on the reasonable expectations of privacy of its student athletes was minimal.

**(a)**

CU argues that collection of the urine samples in a closed stall with aural monitoring minimizes any intrusion. We agree that aural monitoring is less intrusive than visual monitoring, but was we have already noted, the trial court found that CU and the other defendants have

> refused to agree that they will not return to the policy which was initially challenged in this class action [i.e., the policy according to which students were visually monitored while providing a urine sample]. In fact, defendants have indicated that there are circumstances under which they would return to that policy.

On certiorari review, it is clear from CU's brief that CU desires that we assume that only aural monitoring is at issue, but at the same time, CU does not challenge the trial court's finding that, in effect, CU might return to a visual monitoring system. In

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[19] The court itself in *Acton* questioned whether it would have reached the same result if the high school in question were a large metropolitan school, *id.* at 1365 n. 8, and it specifically distinguished the case before it, on factual grounds, from a case such as *Derdeyn*, 832 P.2d 1031, that involved "college students who have, for the most part, reached the age of adulthood," *Acton*, 796 F.Supp. at 1363 n. 7.

addition, the differences in practice between aural and visual monitoring might not always be so great.[20]

**(b)**

CU argues that student athletes' expectations of privacy with regard to urinalysis are diminished because they routinely give urine samples as part of an annual, general medical examination, and because they regularly undergo close physical contact with trainers. In this regard, it is true that the United States Supreme Court has recognized that urine tests are less intrusive when the "sample is . . . collected in a medical environment, by personnel unrelated to the [employee's] employer, and is thus not unlike similar procedures encountered often in the context of a

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[20] For example, the trial court heard testimony from one female student who failed to perform adequately on a REE, and who was then required to provide a urine sample under the "aural monitoring" program. She testified that pursuant to that program

> I went to the team house and I went — they have a bathroom in the back behind Dave Burton's office and I had to leave the door open and gave them a urine sample.

The following exchange then took place:

> Q Who was there outside the room?
>
> A Terry, [a female trainer,] I believe.
>
> Q Were you watched while you were providing the sample?
>
> A No.
>
> Q How did you feel about the process of someone standing outside while you were providing the sample?
>
> A It bothered me.
>
> Q Why?
>
> A Because it's embarrassing. No one should have to watch someone else pee. It's a private thing, shouldn't be more people in the bathroom. I thought, when I came, I thought it was, you know, they made it seem so minor and it seemed like it was going to be like you go to the doctor and you pee and you put it in a little thing and they open the little door and they take it, you know. The way they made it seem, it didn't seem like it would be that bad until the meeting.

regular physical examination." *Skinner*, 489 U.S. at 626-27. Similarly, the Seventh Circuit Court of Appeals has stated that if an individual is required by his job to undergo frequent medical examinations, then that individual will perceive random urinalysis for drug-testing purposes as being less intrusive. *Dimeo*, 943 F.2d at 682. In this case, however, the trial court heard testimony that samples for random urinalysis-drug-testing were not collected in a medical environment by persons unrelated to the athletic program.[21] In addition, many people have an annual physical examination, and the fact that CU's athletes have an annual physical would not seem to put them into *Dimeo's* category of those who must undergo "frequent" medical examinations. Indeed, the trial court heard testimony from one student athlete that "in that I have never been injured, I have been lucky and so the only time I saw the trainers was for a urinalysis."[22]

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[21] *See, e.g., supra* note 20 and *infra* note 22. In addition, one male student explained as follows the difference between being required to provide a urine sample for drug testing, on the one hand, and undergoing medical treatment or examination, on the other:

> When I was treated by the athletic trainers, of course, they at various times touched various part [sic] of my body, that is necessary for treatment. At no time was I required to disrobe for this treatment or required to bear [sic] my genitals. Now, in the question of being observed giving a urine sample, you have direct, exposed genitals to the trainer and the trainer is looking at it and it's considered a private part of my body in my estimation.

The student was then asked, "How was your interaction between you and the trainers, if you did, when they were treating you for an injury as opposed to when they were interacting with you for the purposes of an eye exam or for obtaining a urine sample?" to which he responded:

> When the trainers were treating me it was more like I was getting medical treatment and they were, say, some sort of medical personnel who were there to help me. In the instance of the drug testing, it was more like they were a policeman, more like an enforcement type situation and the atmosphere changed from friendly to adversarial.

[22] That same female student testified:

> The restroom was filthy in the training room. The one in Wardenburg was okay but the restroom in the training room was always filthy and

*(footnote continues)*

(c)

CU argues that student athletes' expectations of privacy with regard to urinalysis are diminished because they submit to extensive regulation of their on- and off-campus behavior, including maintenance of required levels of academic performance, monitoring of course selection, training rules, mandatory practice sessions, diet restrictions, attendance at study halls, curfews, and prohibitions on alcohol and drug use. In support thereof, CU cites testimony from its athletic director and one student athlete.

CU's athletic director testified in relevant part that the NCAA sets limits on financial aid awards, playing seasons, squad size, and years of eligibility; that the NCAA requires that CU maintains records of each athlete's academic performance; that the "athletes that eat at training tables are football and men's basketball and the other athletes eat in the dorms or at their off-campus residences"; that some coaches within their discretion impose curfews; that athletes are required to show up for practice; that athletes are "advised . . . on what they should take for classes"; that "we have a required study hall in the morning and in the evening"; and that it is "fair to say that the athletes are fairly well regulated." A student athlete testified in relevant part that "Yes," "if you are an NCAA athlete, you have to keep a certain grade average," and "Yes," "if your grades drop below that average, then you are not eligible for competition."

Although it is obviously not amenable to precise calculation, it is at least doubtful that the testimony relied upon by CU fully

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*(footnote continued)*

> you had to do it in front of somebody else and you had to do it in one day. Sometimes my friend and I would be there drinking gallons of water literally after practice trying to go the bathroom . . .

and

> we had to stay and you had to stay there that first year, you had until 6:00 p.m. to give your sample. It was on Tuesdays and if you couldn't, you would have to stay until you could provide a sample. If you missed that day, then it would be considered a positive.

supports CU's assertion that its student athletes are "extensively regulated in their on and off-campus behavior,"[23] especially with regard to all of the particulars that CU asserts. More importantly, none of the types of regulation relied on by CU entails an intrusion on privacy interests of the nature or extent involved in monitored collection of urine samples.

**(d)**

CU argues that student athletes' expectations of privacy with regard to urinalysis are diminished because they must submit to the NCAA's random urinalysis-drug-testing program as a condition of participating in NCAA competition. In this regard, CU's athletic director testified that at NCAA championship events, the NCAA conducts random drug testing of athletes as well as testing of the top three finishers and certain starting players, and evidence in the record suggests that NCAA athletes are required to sign consent forms to such testing.

One student athlete testified that he had never been tested at an NCAA event, but that other students were.[24] Another student was asked how she felt about the NCAA testing program, and she answered:

> Again, it was one of those things like I can't believe this. I just competed and something that I looked forward to for years and years and years and they are doing the same intrusive thing that C.U. had but, you know, I was glad to be there and I wasn't going to argue with [it]. The NCAA is a very big [institution] and, you know, I wouldn't know how to

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[23] Under the third amended program, "athlete" includes "cheerleaders, student trainers and student managers." CU cites nothing in the record that suggests that these athletes are also extensively regulated on and off campus.

[24] There is nothing in the record to suggest that cheerleaders, student trainers or student managers are subject to the NCAA drug testing program. See *supra* note 23.

> fight that. I wouldn't be about to take my team's interests down the tubes because I didn't want to do the urinalysis.

Despite the fact that students might dislike the NCAA drug-testing program, it seems that they must consent to it in order to be NCAA athletes, and submission to one such program could reduce the intrusiveness of having to submit to another. On the other hand, the trial court heard testimony suggesting that part of what is intrusive about the CU program is that it transformed what might otherwise be friendly, trusting, and caring relations between trainers and athletes into untrusting and confrontational relations.[25]

**(e)**

CU argues that student athletes' expectations of privacy with regard to urinalysis are diminished because the consequences of refusing to provide a urine sample are not severe. We appreciate that in comparison to losing one's job, as would be the consequence in some government employee/drug-testing cases, *e.g.*, *Bostic v. McClendon*, 650 F.Supp. 245, 249 (N.D. Ga. 1986), not being able to participate in intercollegiate athletics can be regarded as less of a burden. It is, to be sure, only a very small

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[25] Specifically, CU's athletic director testified that a "common" and "accurate" way to describe the relationship between "the trainers and their athletes" is that they are "friend[s]." He also testified that the trainers take care of "the overall general wellbeing of the athlete and I think not only physically but I think also mentally." However, in describing her relation with a trainer after she had tested positive and was called in the next day for retesting (which turned out negative), one athlete testified "we [the trainer and I] are friends but it was confrontationally. It was an untrusting — I felt that they were considering me untrustworthy." When asked how her relationship with the trainers changed thereafter, she answered:

> Well, probably from bad to worse. We did not dislike each other, it's just it made all the feelings even more so, all the feelings. It is confrontational. Every time I come to the training room, I have to prove my innocence and it was just double that.

The athlete also testified that no one ever explained to her how it was that the first test came back positive.

percentage of college athletes whose college "careers" are essential as stepping stones to lucrative contracts — or to any contract — as professional athletes. On the other hand, however, we must also recognize that many intercollegiate athletes who otherwise could not afford a college education receive athletic scholarships that enable them to obtain a college degree and thereby increase their earning potential. Continuation of such scholarships at CU is dependent upon continued participation in the intercollegiate athletic program, which in turn requires consent to the drug-testing program. Furthermore, many intercollegiate athletes pursue professional careers as high school or college coaches, or as administrators in athletic or recreational programs. Thus, for example, one student athlete who graduated from CU by the time of the trial testified that she worked as a track coach at CU. Another testified that she just recently obtained employment coaching girls' volleyball and basketball at a local high school. While having participated in intercollegiate athletics may not be a formal requirement for such jobs, it is commonplace that applicants with experience at the intercollegiate athletic level will not be disadvantaged in seeking such jobs in comparison with those who lack such experience. Also, we recognize that for many student athletes, participation in intercollegiate athletics is an activity highly valued for its own sake. We therefore believe that the consequences of not being able to participate in intercollegiate athletics must be accorded significant weight.

(f)

Finally, CU argues that student athletes' expectations of privacy with regard to urinalysis are diminished because positive test results are confidential and are not used for the purposes of criminal law enforcement. It is true that an intrusion by the government outside the context of criminal law enforcement is generally less of an intrusion than one for the purposes of law enforcement. However, as a matter of law, we already take this fact into account when we analyze this case according to the

standards of cases like *Skinner* and *Von Raab*, rather than according to the standards of typical cases in the area of criminal procedure where there are very few and well defined exceptions to the requirement of a warrant based on probable cause. In other words, were we to attribute less weight to the students' privacy interests because this is not a criminal case, and also start with the premise that *Skinner* and *Von Raab* control, we would be, in effect, giving double weight in our analysis to the fact that we are not dealing with an issue in criminal procedure. Consequently, the fact that this is not a criminal matter adds nothing to what we must balance at this point in our analysis. Furthermore, as we have already indicated, CU does not in its written descriptions of its drug-testing program give any significant specific or general assurances that test results are confidential.[26]

There is no evidence at all that CU has ever made available, or ever desired to make available, to the general public any student's urine test results, but the list of people to whom students must consent to the release of drug-testing information is substantial, and we are particularly uncertain as to the significance of the fact that in CU's third amended program students must consent to the release of information to "my work supervisor (if applicable)."[27]

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[26] In its third amended program, CU does state that communications between an athlete and physicians at Wardenburg Student Health Center shall be confidential. Given that the physician/patient communications are normally confidential, we do not perceive this as a "significant specific or general assurance" of confidentiality of test results.

[27] CU also asserts in its brief that because "the locker room partakes of an element of 'communal undress,'" the athletes challenging CU's drug testing program have diminished expectations of privacy. We find nothing, however, in the characterization of a locker room as partaking of an element of communal undress that suggests that student athletes would not be offended by the intrusion of being called upon to perform monitored urination for a drug test. For example, the trial court heard testimony from two female athletes that they were not called in from a state of "communal undress" for their random tests, but from the privacy of their homes:

*(footnote continues)*

**(g)**

Having reviewed the record in light of each of CU's assertions, it is clear that in some places CU seems to overstate its case, while in others, it has a valid point. On balance, however, we are in full agreement with the conclusion of the trial court that CU's random, suspicionless urinalysis-drug-testing of athletes is an "intrusion [that] is clearly significant."

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*(footnote continued)*

> Well, I had never liked the program and what happened was — and that was in the fall of 1987, my fourth year, I got called on Tuesday night and it was 7:00 and I was in my pajamas and studying and it was Terry Brown who said I had to come down at that instant to do a test, a urinalysis test.
>
> * * *
>
> And I had an exam the next morning and if I didn't come in at that point I would have a positive and so I had to go in and I didn't have a car. . . .

and

> A Yes, I was home in Longmont one day and they called my house and said you are on the eye list, would you please come and give us — you have to come in and test.
>
> Q How was it that you hadn't seen the list or been able to look at the list?
>
> A Because I was at home. I had a class early and I think it was like Friday or something and I didn't have to go to practice. I didn't have to be supervised, go to a supervised practice so I was home and they called me and I had to come in from Longmont.

In addition, CU's third amended program defines "athletes" to include cheerleaders, student trainers, and student managers, and although student trainers and student managers must be accustomed to a locker room, it is not obvious to us that any of these three categories of persons must participate in the communal undress. Finally, the record is silent on whether locker room conditions are the same for all intercollegiate sports.

**2**

CU asserts several interests in maintaining its drug-testing program. These interests are preparing its athletes for drug testing in NCAA championship events, promoting the integrity of its athletic program, preventing drug use by other students who look to athletes as role models, ensuring fair competition, and protecting the health and safety of intercollegiate athletes.[28]

We begin our consideration of these interests by observing that suspicionless urinalysis-drug-testing by the government has been upheld in numerous cases, and in many of those cases, courts have characterized the relevant government interests as "compelling." *E.g., Skinner*, 489 U.S. at 628 (government has "compelling" interest in testing railroad employees whose "duties [are] fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences"); *Von Raab*, 489 U.S. at 670 (government has "compelling interest in ensuring that front-line [drug] interdiction personnel [in the United States Customs Service] are physically fit, and have unimpeachable integrity and judgment"); *id.* at 677 (government has a compelling interest in protecting truly sensitive information from those who might compromise such information); *id.* at 679 (government has "compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry"); *Cheney*, 884 F.2d at 610 (government has a "compelling safety interest in ensuring that the approximately 2,800 civilians who fly and service its airplanes and helicopters are not impaired by drugs").[29] However, the Supreme Court has

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[28] CU has not asserted any financial interest in maintaining its drug-testing program. *Cf. Dimeo*, 943 F.2d at 685 (state asserted a "substantial . . . financial interest" in random drug testing of professional jockeys, starters, and outriders).

[29] We do not include in this list of examples the district court's opinion in *O'Halloran v. University of Washington*, 679 F.Supp. 997, 1002, 1007 (W.D. Wash. 1988) (finding that the NCAA and the University of Washington

*(footnote continues)*

not held that only a "compelling" interest will suffice, see *Skinner*, 489 U.S. at 624; *cf. Von Raab*, 489 U.S. at 666, and some courts have upheld suspicionless urinalysis-drug-testing by the government without finding a compelling interest. *E.g.*, *Dimeo*, 943 F.2d at 681, 683, 685 (explaining that decreasing levels of intrusiveness require decreasing levels of government justification, declining to characterize as compelling the government's interest in protecting professional jockeys, starters, and outriders from injuring one another at the race track, characterizing the state's financial interest as "substantial," and holding that these two interests outweigh "the very limited privacy interest[s]" of professional jockeys, starters, and outriders); *International Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1462, 1463, 1464 (9th Cir. 1990) (finding that the government has a "great" interest in the safety of the natural gas and hazardous liquid

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*(footnote continued)*

have a "compelling interest . . . in protecting the health of student-athletes, reducing peer pressure and temptations to use drugs, ensuring fair competitions for student-athletes and the public, and educating about and deterring drug abuse in sports competition" and concluding that these interests outweigh the privacy interests of student athletes), *rev'd*, *O'Halloran v. University of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988) (remanding "the action to the district court with directions that that court remand the entire case back to the state court from which it was removed" because "the district court did not have subject matter jurisdiction over the third-party complaint and removal was improper"), for several reasons. First, and most obvious, the district court lacked subject matter jurisdiction. Second, *O'Halloran*, 679 F.Supp. 997, was issued before *Skinner* and *Von Raab* were decided. Third, and perhaps more important, the issue presented in *O'Halloran*, 679 F.Supp. 997, was the constitutional validity of the NCAA's drug-testing program and the University of Washington's participation in it, *id.* at 998, as opposed to any program conducted by the University of Washington. In this regard, the district court held that the University of Washington's participation in the NCAA program did not constitute state action, and that the NCAA is not a state actor. *Id.* at 1002. Thus, the court's discussion of the "government's" compelling interests and the privacy interests of intercollegiate athletes is dicta, and it does not appear that the NCAA's intrusion upon the privacy of athletes at NCAA championship competitions is as severe as a university's intrusion on its own athletes.

pipeline industry, and holding that this "strong" interest is sufficient to justify random urinalysis testing of pipeline workers). Hence, rather than trying to characterize CU's interests as "compelling," "strong," "substantial," or of some lesser degree of importance, we think it is more instructive simply to compare them with other types of commonly asserted interests that have been held sufficient or insufficient to justify similar intrusions.

Our review of the cases in this area supports the conclusion of the Ninth Circuit Court of Appeals in *Local 1245 v. Skinner*, a case involving a program for random drug testing of employees, absent individualized suspicion, that "the concern for public safety animates the general acceptance of drug testing by courts." *Local 1245 v. Skinner*, 913 F.2d at 1462 (citing as support for this proposition *Skinner, Von Raab*, and cases from the Third, Fourth, Eighth, and District of Columbia Circuits); *see also O'Keefe v. Passaic Valley Water Comm'n*, 602 A.2d 760, 763 (N.J. Super. A.D. 1992) (reading *Skinner* and *Von Raab* as holding that "the government may nevertheless require drug testing [absent reasonable suspicion] without running afoul of the proscriptions of the Fourth Amendment in those circumstances in which the government's special and compelling need to protect the public safety outweighs the employee's privacy interest"). For example, courts have upheld suspicionless urinalysis-drug-testing of Army-employed civilian air traffic controllers, pilots, aviation mechanics, aircraft attendants, police, and guards, *Cheney*, 884 F.2d at 610-11, 612-13; civilian employees of chemical weapons plant who "have access to areas . . . in which experiments are performed with highly lethal chemical warfare agents," *Thomson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (per curiam); drivers, mechanics and attendants whose primary duty is the daily transportation of handicapped children on school buses, *Jones v. Jenkins*, 878 F.2d 1476, 1477 (D.C. Cir. 1989) (per curiam), *modifying Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987); bus or commercial truck drivers who operate "enormous" trucks such that "a single mistake in judgment or momentary lapse in attention can have devastating consequences for other travelers," *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d

1292, 1304 (9th Cir. 1991); "scrub techs" in public hospitals whose duties include bringing patients to the operating room, setting up the sterile field, laying out the proper instruments, and assisting during surgery, *Kent v. Claiborne County Hosp.*, 763 F.Supp. 1362, 1364, 1367 (S.D. Miss. 1991); employees holding top secret national security clearances, *Harmon v. Thornburgh*, 878 F.2d 484, 491-92 (D.C. Cir. 1989); county correctional employees with regular access to prisoners or weapons, *Taylor v. O'Grady*, 888 F.2d 1189, 1199, 1201 (7th Cir. 1989); and police officers who carry firearms or participate in drug interdiction efforts, *Guiney v. Roaches*, 873 F.2d 1557, 1558 (1st Cir. 1989) (per curiam). At the same time, courts have found insufficient governmental interests to uphold suspicionless urinalysis-drug-testing of high-school students who participate in extracurricular activities, *Brooks*, 730 F.Supp. at 764-66; United States Department of Justice employees who are prosecutors in criminal cases and other employees who have access to grand jury proceedings, *Harmon*, 878 F.2d at 496; county correctional employees who have no reasonable opportunity to smuggle narcotics to prisoners and no access to firearms, *Taylor*, 888 F.2d at 1201; civilian laboratory workers at the Army's forensic Drug Testing Laboratories, *Cheney*, 884 F.2d at 613, 615; civilian employees in the chain of custody process for biochemical testing at the Army's forensic Drug Testing Laboratories, *id.*; and water meter readers who must enter customers' homes in order to read the meters, *O'Keefe*, 602 A.2d at 764. In addition, courts have questioned the propriety of suspicionless testing of secretaries, engineering technicians, research biologists, and animal caretakers who work at chemical and nuclear facilities, *Cheney*, 884 F.2d at 611; police department personnel who do not carry firearms or participate in drug interdiction efforts, *Guiney*, 873 F.2d at 1558; heads of purchasing departments in hospitals who have "vital and important responsibility essential to the proper supply of medical materials," *Kemp*, 763 F.Supp. at 1367; and United States Customs Service employees who are required to handle classified material, *Von Raab*, 489 U.S. at 677.

CU asserts no significant public safety or national security interests.[30] This is not by itself dispositive, but absent a showing by CU that its athletes have a greatly diminished expectation of privacy or that its program is not significantly intrusive, the great majority of cases following *Skinner* and *Von Raab* clearly militate against the conclusion that CU's program is a reasonable exercise of state power under the Fourth Amendment. This is so despite the fact that CU's interest in protecting the health and safety of its intercollegiate athletes, like its interest in protecting all of its students, is unquestionably significant.

We have not been persuaded that CU's athletes have a greatly diminished expectation of privacy, nor are we persuaded that CU's program is not significantly intrusive. In addition, we question whether some of the interests asserted by CU are even significant for Fourth Amendment purposes. For example, although the integrity of its athletic program is, like all the other interests asserted by CU, a valid and commendable one, it does not seem to be very significant for Fourth Amendment purposes. *See Local 1245 v. NRC*, 966 F.2d at 525 n. 9 (In evaluating a program for random drug testing of employees absent individualized suspicion, the court said, "The NRC wisely decided to refrain from pursuing its integrity of the workforce rationale on appeal. This rationale has almost uniformly been rejected by the courts as insufficient to justify drug testing of employees"); *O'Grady*, 888 F.2d at 1196. Similarly, although the promotion of fair competition builds character in athletes and enhances the entertainment value of athletic events, CU does not explain why the promotion of fair competition is itself an important *governmental* interest, just as it does not explain why preventing the

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[30] The possible exception is preventing drug use by other students who look to athletes as role models. However, CU presented no evidence that other CU students look to its athletes as role models, nor did CU present any evidence that its program, by deterring drug use among its athletes, has deterred drug use among its general student population. Absent any such evidence in the record, this possible public safety concern is purely speculative.

disqualification of its athletes at sporting events is an important *governmental* interest.

We therefore hold, based on a balancing of the privacy interests of the student athletes and the governmental interests of CU, that CU's drug-testing program is unconstitutional under the Fourth Amendment. More specifically, we hold that random, suspicionless urinalysis-drug-testing by CU of student athletes is unconstitutional under the Fourth Amendment if that testing is conducted according to the procedures utilized in any of CU's drug-testing programs to the date of trial, or if that testing is conducted in a manner substantially similar to any of the procedures utilized in any of CU's drug-testing programs to the date of trial. Furthermore, because the Colorado Constitution provides at least as much protection from unreasonable searches and seizures as does the Fourth Amendment, CU's drug-testing program is also unconstitutional under Article II, Section 7, of the Colorado Constitution.

**B**

CU asserts, however, that even if its drug-testing program is not otherwise constitutionally reasonable, there is no constitutional violation because its student athletes voluntarily consent to testing. We next address that argument.

A warrantless search of an individual is generally reasonable under the Fourth Amendment if the individual has voluntarily consented to it. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973). A voluntary consent to a search is "a consent intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." *People v. Carlson*, 677 P.2d 310, 318 (Colo. 1984) (citing *Bustamonte*, 412 U.S. 218, and *People v. Helm*, 633 P.2d 1071 (Colo. 1981)). Whether consent to a search was voluntary "is a question of fact to be determined from all the circumstances . . . ." *Bustamonte*, 412 U.S. at 248-49; accord *United States v. Wright*, 932 F.2d 868, 878 (10th Cir. 1991) ("Whether a

search was voluntary is a question of fact to be determined by the district court from the totality of the circumstances."); *Carlson*, 677 P.2d at 318 ("Voluntariness is a question of fact to be determined from the totality of circumstances;"). The government has the burden of proving that consent to a search was voluntarily given, *Bustamonte*, 412 U.S. at 222; *People v. Savage*, 698 P.2d 1330, 1334 (Colo. 1985); *Carlson*, 677 P.2d 310, 318 (Colo. 1984), and we must defer to the trial court's findings on the factual issue of voluntariness unless its findings are clearly erroneous, *Wright*, 932 F.2d at 878; *United States v. Corral*, 823 F.2d 1389, 1393 (10th Cir. 1987), or not supported by the record, *People v. Lowe*, 616 P.2d 118, 124 (Colo. 1980); *see Carlson*, 677 P.2d at 318.

The trial court heard specific direct testimony from several intercollegiate student athletes who described how and when they were presented with consent forms to sign, and why they signed them. CU had the opportunity to cross-examine these students, and to present direct testimony of its own. The intercollegiate student athlete who testified on behalf of CU was not asked about how or when she was told of the drug-testing program, how or when she was presented with a consent form to sign, or why she signed the form. The Athletic Director for CU and CU's Head Athletic Trainer testified in general about how and when intercollegiate student athletes are notified about the drug-testing program, although neither testified about how and when the students are actually presented with consent forms to sign.[31]

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[31] CU's Athletic Director testified that "at the initial team meeting, the athletes all sign the NCAA forms and consent to the NCAA [drug] testing at the championship events." The record indicates, however, that the NCAA drug-testing program is separate from CU's drug-testing program, and that each program uses separate consent forms. The evidence from the student athletes suggests that consent forms are signed after the initial team meetings and that such meetings are held at the beginning of each academic year.

On the basis of this evidence, the trial court concluded:

> The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary. It is quite clear that they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent. As in the cases cited,[32] the "consent" obtained by the University is not voluntary . . . .

CU argues that this should not be understood as a factual finding by the trial court, but as an erroneous legal conclusion based improperly on the "unconstitutional conditions" doctrine of *Perry v. Sinderman*, 408 U.S. 583 (1972).[33] In light of the language used by the trial court, and the authority that it cites, we are persuaded that the trial court did make a factual finding on the issue of voluntary consent, and that the trial court, as an alternative ground for its decision, also applied the doctrine of unconstitutional conditions.

The trial court reasoned as follows:

> It is the duty of the government to "demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. Voluntariness i[s] a

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[32] In the immediately preceding paragraph the trial court cited *Schaill*, 864 F.2d 1309, *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987), *American Federation of Government Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga. 1986), and *Bostic v. McClendon*, 650 F.Supp. 245 (N.D. Ga. 1986).

[33] CU has not been entirely consistent with its position on this issue before this court. In its opening brief it argued that after resolving the unconstitutional conditions question, "[t]he question remains whether the University's program provides for voluntary, knowing, and intelligent consent, which must be tested by the totality of the circumstances." In its reply brief, however, CU argues that we should confine our attention to the unconstitutional conditions issue, and appears to base the argument on the contentions that this was the only issue addressed by the trial court and that the manner in which the issues were framed in our grant of certiorari should limit our review.

question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

The fact that participation in intercollegiate sports is not a "right" but a "benefit" does not alter the requirement that any consent be voluntary. The Supreme Court has acknowledged that

> Though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest . . . . For if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible. *Perry v. Sinderman[n]*, 408 U.S. 583, 597 (1972).

It is quite clear that no consent can be voluntary where the failure to consent results in a denial of the governmental benefit. *Bostic v. McClendon*, 650 F.Supp. 245 (N.D. Ga. 1986) ("Consent" by city clerk's office and police personnel to urinalysis testing was not voluntary where employment would have been terminated if personnel refused to participate); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987) (Police academy cadets did not voluntarily consent to urinalysis for drug testing where cadets believed that producing urine samples was necessary to retain their jobs); *American Federation of Gov. Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga. 1986) (Because signed consent to Department of Defense mandatory urinalysis drug testing was given only because jobs would be lost if consent forms were not signed, the "consent" obtained was not voluntary);

> *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) ("Consent" by high school student-athletes to drug testing not effective as consent because participation in urinalysis testing was required for participation in interscholastic athletics).
>
> The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary. It is quite clear that they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent. As in the cases cited, the "consent" obtained by the University is not voluntary . . . .

In *Bostic* and *Feliciano*, the trial courts applied the "all the circumstances" test articulated in *Bustamonte*, 412 U.S. at 248-49, and found as a matter of fact that the respective plaintiffs' consent to urinalysis-drug-testing was not voluntary. *See Feliciano*, 661 F.Supp. at 593-95;[34] *Bostic*, 650 F.Supp. at 249. In *Weinberger*, the trial court relied on *Bustamonte* and found as a matter of fact that certain individuals did not voluntarily consent to urinalysis-drug-testing; in addition, the trial court applied the doctrine of unconstitutional conditions and held that consent to such testing was not a valid condition of government employment and could not have effected a waiver of the plaintiffs' rights under the Fourth Amendment. *Weinberger*, 651 F.Supp. at 736. In *Schaill*, a panel of the Seventh Circuit Court of Appeals quoted from *Perry v. Sindermann*, 408 U.S. 593, and seemed to hold as a matter of law that high school students cannot give valid consent to random drug testing if the giving of such consent is a condition of their being able to participate in interscholastic athletics. *Schaill*, 864 F.2d at 1312-13.

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[34] *Feliciano v. City of Cleveland*, 988 F.2d 649 (6th Cir. 1993), which did not reach any Fourth Amendment issue, id. at 654 n. 3, reports that *Feliciano*, 661 F.Supp. 578, was vacated by the district court in an unpublished order on December 14, 1989. *Feliciano*, 988 F.2d at 653. The trial court in this case issued its order on August 22, 1989.

Hence, in deciding the issue of "voluntary consent," the trial court cited *Bustamonte* and *Sindermann*. Then it relied on two cases (*Bostic* and *Feliciano*) in which trial courts found as matter of fact under Bustamonte that the certain individuals did not voluntarily consent to urinalysis-drug-testing; one case *(Weinberger)* in which the trial court found as a matter of fact under *Bustamonte* that certain individuals did not voluntarily consent to urinalysis-drug-testing, and in addition, that consent to such testing was not a valid condition of government employment and could not have effected a waiver of the plaintiffs' rights under the Fourth Amendment; and one case *(Schaill)* that applied the doctrine of unconstitutional conditions and seemed to hold that high school students cannot give valid consent to random drug testing if such consent is a condition of their being able to participate in interscholastic athletics. We therefore are persuaded that the trial court, like the trial court in *Weinberger*, decided the issue of "voluntary consent" on the alternative grounds. Specifically, the trial court found as a matter of fact under *Bustamonte* that "the evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary." In the alternative, the trial court relied on the doctrine of unconstitutional conditions and held that no consent can be voluntary under the Fourth Amendment where the failure to consent results in a denial of a government benefit such as participation in intercollegiate sports at a state university.

We therefore must determine whether the record supports the trial court's finding that CU failed to carry its burden of proving that the consents to search that are at issue in this case are voluntary. In this connection, it must be remembered that this is a class action. Such an action is based on the premise that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." C.R.C.P. 23(a)(3). The class members consist of both present and prospective student athletes. *See supra* note 9. Therefore, although it may initially appear anomalous that the consent issue could be decided as to future student athletes or on other than an individualized basis, the case was tried on the premise that the procedures for

obtaining consents are standard components of the drug-testing program and are uniform. That is not to say that there are not variations in procedures dependent upon the times the students approach or are approached by CU, but rather that in each given situation a potential student athlete is advised of the drug program and solicited to consent in essentially standard ways. Thus, the procedures routinely followed in implementation of the drug-testing program, as applied to student athletes typified by those who testified at trial, are what truly at issue in determining the voluntariness of consent. Consistent with this analysis, in its opening brief in this court, in which CU recognizes that "whether the University's program provides for voluntary, knowing, and intelligent consent" is a question to be resolved, *see supra* note 33, CU makes no argument that individualized determinations are required or that consent cannot be determined with respect to future students. Our review of the trial court's ruling on voluntariness of consent to search must be conducted with the foregoing framework in mind.

It is clear from the record that a student will be denied the opportunity to participate in CU's intercollegiate athletic program in absence of execution of a signed consent. It is equally clear that no athletic scholarship will be available to a student who does not consent to drug testing. The pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing under such circumstances is obvious.

The record suggests that consents are signed following team meetings at some time around the beginning of the academic year. Prospective student athletes recruited by CU are advised of the drug-testing program in a general way early in their contacts with CU and with specificity prior to being asked to sign consents. The record does not reflect whether the prospective student athletes are given information at a time when they have a meaningful opportunity to apply for admission to another educational institution or for acceptance into an athletic program of

such an alternative institution.[35] There is nothing in the record to suggest that prospective student athletes are advised that CU may elect to revert to its former procedures of visually monitoring the collection of urine samples.

It must be remembered that the consent in question is the consent to an otherwise unconstitutional search, and that to be voluntary such a consent must be "freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." *People v. Carlson*, 677 P.2d at 318 (citing *Bustamonte*, 412 U.S. 218, and *People v. Helm*, 633 P.2d 1071). We conclude that the record supports the trial court's finding that CU failed to bear its burden to prove that consents obtained pursuant to its random, suspicionless urinalysis-drug-testing program for the certified class of intercollegiate student athletes are voluntarily given. We accordingly hold that for the purposes of the Fourth Amendment and Article II, Section 7, of the Colorado Constitution, CU's intercollegiate student athletes do not voluntarily consent to being searched pursuant to the drug-testing program.[36]

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[35] One student athlete testified that to transfer to another school after accepting an athletic scholarship results in a one-year loss of eligibility for participation in intercollegiate athletics.

[36] Because we upheld the trial court's finding that CU failed to prove voluntary consent, it is unnecessary and inappropriate for us to consider whether the trial court reached a legally correct result under the doctrine of unconstitutional conditions. See *Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'") (quoting *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944)); *People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985) ("Axiomatic to the exercise of judicial authority is the principle that a court should not decide a constitutional issue unless . . . the necessity for such decision is clear and inescapable."). We therefore express no opinion on whether, in theory, it is ever possible for university students voluntarily consent under the Fourth Amendment, or under Article II, Section 7, to a drug-testing program if consent to that program is a condition of the ability to participate in intercollegiate athletics. The trial court unnecessarily addressed this issue.

*(footnote continues)*

*(footnote continued)*

We do note, however, that the result reached by the trial court finds support in the analyses of writers who have endeavored to reconcile the numerous and difficult cases found in this area of law. See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L.Rev. 1185, 1197-1212 (1990) (analysis of 23 United States Supreme Court opinions applying the doctrine of unconstitutional conditions); Sally Lynn Meloch, Note, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Condition Doctrine and the Fourth Amendment*, 60 S.Cal.L.Rev. 815, 826-35, 849-50 (1987) (analysis of 7 United States Supreme Court opinions applying the doctrine of unconstitutional conditions). These writers conclude directly , *see* Meloch, *supra*, at 835, and indirectly, *see* Baker, *supra*, at 1203-04, that whether a state university such as CU has unconstitutionally conditioned the benefit of participation in intercollegiate athletics would depend on a balancing of the same factors that are germane to determining whether CU's program is reasonable under the Fourth Amendment without the voluntary consent of its students, specifically, the magnitude of the governmental interests involved and the degree to which the program burdens the privacy interests of the athletes. *See also Schaill*, 864 F.2d at 1312-13 (suggesting that high school students could not under the Fourth Amendment give valid consent to random drug testing if the giving of such consent is a condition of their being able to participate in interscholastic athletics and if the testing otherwise would constitute an illegal search).

We further note that the principal case relied upon by CU for its interpretation of the doctrine of unconstitutional conditions, specifically, *Wyman v. James*, 400 U.S. 309 (1971) (recipient of Aid to Families with Dependent Children public assistance benefits could not refuse a home visit by a social worker without risking the termination of benefits), does not support that interpretation for several reasons. First, *Wyman* held that the home visit in question was so unintrusive that it was not even a search under the Fourth Amendment, *id.* at 317, whereas random, monitored urinalysis-drug-testing is obviously a search. Second, the governmental interests at stake in *Wyman* were the compelling *parens patriae* governmental interest in protecting the well-being of young, dependent children, *id.* at 316, 318, 322 n. 9, and the substantial governmental interest in making sure that tax dollars are appropriately spent and not wasted either through welfare fraud or otherwise, *id.* at 318-19. No similar interests are implicated in this case. Third, *Wyman* held that even if the home visit were a search, it was reasonable. Thus, while *Wyman* reached in dicta the issue of whether the government may condition a benefit on consenting to a search that is reasonable, this is a different issue than whether the government may

*(footnote continues)*

## III.

For the foregoing reasons, we affirm the judgment of the court of appeals.[37]

**CHIEF JUSTICE ROVIRA dissenting:**

For purposes of this case, I will assume the nonconsensual, random, suspicionless urinalysis-drug-testing of student athletes is unreasonable under the Fourth Amendment, in spite of the Supreme Court's approval of suspicionless drug testing in other contexts. See *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). I write separately because the majority has misconstrued the basis for the trial court's ruling concerning the question of voluntariness in such a way that, if accepted, would be undeserving of this court's deference. Maj. op. at 46-51 [863 P.2d at 946-949]. Additionally, I believe that when properly construed, the trial court's ruling should be reversed on the basis of the unconstitutional conditions doctrine -- application of which is plainly necessitated by the nature of the class which originally brought this suit. Accordingly, I respectfully dissent.

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*(footnote continued)*

condition a benefit on a search that is unreasonable without the beneficiaries' consent, and it is the latter issue that is implicated in this case, *see supra* part IIB.

The trial court permanently enjoined CU "from requiring any urine samples from student athletes for the purposes of drug testing . . . ." In view of our conclusion that it was unnecessary to address the unconstitutional conditions issue, we recognize the possibility that in the future CU might be able to devise a program involving truly voluntary consents to drug testing. In such event, CU is free to apply for modification or dissolution of the injunction.

[37] In so doing, we express no opinion on the correctness of the court of appeals' holding that objective, reasonable, individualized suspicion of drug use could in some circumstances warrant mandatory drug testing of intercollegiate athletes by CU. *See supra* at 15 [863 P.2d at 935].

I

The trial court, in rendering its ruling, stated that

> [t]he evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary. It is quite clear that they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent. As in the cases cited, the "consent" obtained by the University is not voluntary . . . .

The majority finds that this ruling is based on "alternative grounds," and concludes that the trial court's factual finding concerning the question of voluntariness is itself sufficient to sustain the trial court's ruling. Maj. op. at 50-55 [863 P.2d at 948-950]. Accordingly, the majority declines to opine "whether, in theory, it is ever possible for university students voluntarily to consent under the Fourth Amendment, or under Article II, Section 7, to a drug-testing program if consent to that program is a condition of their ability to participate in intercollegiate athletics." *Id.* at 54 [863 P.2d at 950] n. 36.

The question of the voluntariness of consent for purposes of the Fourth Amendment is a question of fact which is to be determined by the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *People v. Carlson*, 677 P.2d 310, 318 (Colo. 1984). Thus, in reviewing the trial court's finding that "[t]he evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary," we defer to the trial court unless its finding is clearly erroneous or not supported by the record. *See* maj. op. at 45-46 [863 P.2d at 946] (and authority cited therein).

The trial court was not, for obvious reasons, presented with any evidence by prospective student athletes concerning the voluntariness of consent to random drug testing which has not yet

been given.[1] No student athletes who are considering attending the University of Colorado ("CU") and also considering "consenting" to CU's drug-testing program testified; no individual who may become a student athlete testified regarding the voluntariness of consent which may be given if that individual becomes an athlete of intercollegiate caliber and then attends CU and is then informed about CU's drug-testing program. In short, the only evidence presented to the trial court concerning the voluntariness of consent pertained, as logic requires, to "consents given" by actual CU student athletes. No evidence was, nor could it conceivably be, presented regarding whether consent to drug testing — which has not yet been given — was given voluntarily as a matter of fact.

Moreover, the fact that "the procedures for obtaining consents are standard components of the drug-testing program and are uniform," maj. op. at 51 [863 P.2d at 949], in no way alters the conclusion that no evidence was presented regarding the voluntariness of consents which have yet to be given, because governmental conduct is not the sole fact to be considered in applying the totality of the circumstances test set forth in *Bustamonte*, 412 U.S. 218 (1973).

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[1] The plaintiff class consists of both present and prospective student athletes. Pursuant to C.R.C.P. 23, the plaintiff class was certified as follows:

> The present and prospective undergraduate student athletes who are or will be subject to the University of Colorado intercollegiate athletic department's drug education program as a condition of participation in the University of Colorado intercollegiate athletic program limited as follows: Those present undergraduate student athletes who have never tested positive or have been subject to discipline or sanction as a result of a positive test result; and those present student athletes, who, although having executed waivers, consents or agreements to participate in the University of Colorado's drug education program, object to the program as being an unconstitutional condition of participation; and lastly, those prospective undergraduate student athletes who will execute waivers, consents or agreements to participate in the University of Colorado's drug education program, but who object to the program as being an unconstitutional condition of participation.

To the contrary, the totality of the circumstances test, as applied in this case, clearly requires that the level of coercion which is brought to bear on individual student athletes must be taken into account. The impossibility of determining, as a factual matter, the question of voluntariness with respect to this entire class is due, in part, to the fact that the relative degree of coercion will vary among individuals depending on their circumstances. For example, while the pressure imposed on a scholarship-dependent student may be obvious, the same cannot be said of the student who is not dependent on financial assistance in order to attend college but who is nevertheless required to consent to CU's drug-testing program. Similarly, the pressure that may be brought to bear on a heavily recruited individual who essentially has the "pick of the crop" in terms of which college institution to attend, would clearly be less than an aid-dependent student whose only opportunity to attend college on an athletic scholarship may be to accept the conditions which CU attaches to such attendance. Consequently, I disagree with the majority's conclusory statement that if participation in athletics and receipt of an athletic scholarship are conditioned on a student's consent to drug testing, then "[t]he pressure on a prospective student athlete to sign a consent to random, suspicionless drug testing . . . is obvious." Maj. op. at 52 [863 P.2d at 949].

Thus, if the trial court regarded the factual question of voluntariness as a sufficient basis for ruling that consent to CU's drug-testing program is per se invalid — i.e., involuntary as to present and prospective student athletes — that ruling is not supported by the evidence. Furthermore, because such a ruling would require an inference based upon "facts" which, by necessity, simply do not and could not exist, that finding is clearly erroneous. *See Peterson v. Ground Water Comm'n*, 195 Colo. 508, 516 579 P.2d 629, 634-35 (1978) (inferences to be drawn from evidence will not be disturbed unless so clearly erroneous as to find no support in the record). Thus, if the trial court did conclude, as a factual matter, that no members of the plaintiff class have/can

voluntarily consent to CU's drug-testing program, that finding is one that is not entitled to deference by this Court.[2]

In my judgment the trial court not only could not, but did not,[3] rely on the factual question of voluntariness as its basis to conclude the consent given by any member of the plaintiff class is involuntary. Rather, the trial court must have relied on the unconstitutional conditions doctrine as support for its conclusion

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[2] Moreover, considering the factual question of whether consent given by student athletes can be voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), when no deference is paid to the trial court's finding leaves this Court in a position of attempting to resolve a factual question on the basis of a record that is, by necessity, inadequate to do so. The reasons this is so, of course, are the same reasons why the trial court's ruling, as characterized by the majority, is erroneous and lacks any evidentiary support: No evidence is contained in the record which provides, or could provide, the factual basis for the finding that consent is not voluntary for persons who are not yet student athletes at CU and have not been informed of, nor "consented" to, CU's drug-testing program.

While I agree with the majority that CU bears the burden of proving the voluntariness of a consensual search, maj. op. at 45, the majority's presumption that the factual question of voluntariness is one which could be made as to this entire class creates a burden on CU which logically cannot be met under any circumstances conceivable to me. This fact adds additional support to my conclusion that the trial court did not, and could not properly, rest its decision respecting voluntariness on "alternate grounds" but had to rely on the unconstitutional conditions doctrine in order to render a decision applicable to this entire class. *See supra* § II, pp. 4-5.

[3] The majority states that the authority cited by the trial court in rendering its decision supports the "obvious" conclusion that the trial court relied on alternative grounds in deciding the voluntary consent issue, maj. op. at 47-51 [863 P.2d at 947-949], *i.e.*, voluntariness as a factual matter and voluntariness as a legal question under the unconstitutional conditions doctrine. While I am willing to concede that the majority correctly characterizes the authority cited by the trial court as relying on both types of voluntariness analysis, I think it far more probative to examine the propositions which the trial court cited that authority in support of. Doing so clearly indicates that the trial court was relying almost exclusively on the unconstitutional conditions doctrine in rendering its decision (as is required by the nature of the plaintiff class).

*(footnote continues)*

because only that legal finding logically could be applicable to both present and future student athletes.[4] Consequently, resolution of this case clearly requires us to decide the question which we granted certiorari to review: Whether student athletes can give valid consent to the University's drug-testing program if their consent is a condition of participation in intercollegiate athletics at the University?

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*(footnote continued)*

The trial court, after citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), cited *Perry v. Sindermann*, 400 U.S. 583 (1972) (unconditional conditions analysis), and *Bostic v. McClendon*, 650 F.Supp. 245 (N.D. Ga. 1986); *Feliciano v. City of Cleveland*, 651 F.Supp. 578 (N.D. Ohio 1987); *American Federation of Gov't Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga. 1986); and *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988). The trial court cited each of those later four cases in support, respectively, of the following propositions: "'Consent' by city clerk's office and policy personnel to urinalysis testing was not voluntary where employment would have been terminated if personnel refused to participate"; "Police academy cadets did not voluntarily consent to urinalysis for drug testing where cadets believed that producing urine samples was necessary to retain their jobs"; "Because signed consent to Department of Defense mandatory urinalysis drug testing was given only because jobs would be lost if consent form were not signed, the 'consent' obtained was not voluntary"; and 'Consent' by high school student-athletes to drug testing not effective as consent because participation in urinalysis testing was required for participation in interscholastic athletics."

The trial court cited these cases as support for a finding of involuntariness based on the fact that "consent" had been given because the receipt of a governmental benefit was conditioned on giving such consent. This is precisely what the unconstitutional conditions doctrine concerns itself with.

[4] The force of logic alone does not preclude the possibility that the trial court erred by ruling that the factual question of voluntariness is sufficient to render a decision applicable to this class. A plain reading of the trial court's ruling, however, belies such a conclusion. *See supra* p. 1 [863 P.2d at 951] (quoting trial court's ruling) and *supra* note 3, at 5 [863 P.2d at 953].

A

While the doctrine of unconstitutional conditions has been criticized as "riven with inconsistencies," Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1416 (1989), and commentators invariably point to the apparent tensions, ambiguities, and absence of a clear theoretical underpinning to the doctrine, *see, e.g.*, Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185 (1990) and Seth F. Kreimber, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984), there seems to be substantial agreement with respect to the general contours of the doctrine.

> In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly "coerce," "pressure," or "induce" the waiver of constitutional rights. Thus, in the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution.

Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, The Supreme Court 1987 Term*, 102 Harv.L.Rev. 5, 6-7 (1988). The question, of course, is whether this case presents one of those occasions in which the receipt of a governmental benefit may not be conditioned on an individual's agreement to waive a right guaranteed by the Constitution. I would hold that it does not.

I am aware of no authority which directly confronts and analyzes the question of how a court should determine the constitutionality of conditioning a government benefit on the waiver of Fourth Amendment rights. Though this question is not strictly one of first impression, in my opinion, the courts which have considered this issue have done so in such a way as to render

their "analysis" all but useless as persuasive precedential authority.

For example, some courts simply have asserted that "a search otherwise unreasonable does not become constitutionally palatable because it is attached as a condition of employment." *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1548 (6th Cir. 1988). Tautologically concluding that consent to an "otherwise unreasonable search," *i.e.,* one that is conducted in the absence of consent, always amounts to an unconstitutional condition is, of course, simply a way of avoiding the unconstitutional conditions question — the term "otherwise unreasonable" as used here amounts to nothing more than saying "aside from the unconstitutional conditions question, an unreasonable search is an unreasonable search."

Other courts have apparently assumed that the unconstitutional conditions doctrine stands as a per se rule proscribing the conditioning of governmental benefits on the waiver of constitutional rights. *See American Fed'n of Gov't Employees v. Weinberger*, 651 F.Supp. 726, 736 (S.D. Ga. 1986) ("Advance consent to future *unreasonable* searches is not a reasonable condition of employment."). In fact, this appears to be the presumption that the trial court adopted in rendering its judgment on the unconstitutional conditions issue: "It is quite clear that they [*i.e.,* consents] are 'coerced' for constitutional purposes by the fact that there can be no participation in athletics without a signed consent."

In spite of some language to the contrary, *see, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("It [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ."); *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) ("The government may not deny a benefit to a person because he exercises a constitutional right"), the Court has not established the unconstitutional conditions doctrine as a per se prohibition on the government's ability to condition the receipt of a benefit on the waiver of constitutional rights. See *Zap v. United States*, 328 U.S.

582, 628 (1946) (holding that Fourth and Fifth Amendment rights may be waived as a condition of receiving a government contract: "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and record, he voluntarily waived such claim to privacy which he otherwise might have had . . . ."); *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978) ("incidental effect" of denial of social security benefits on right to travel does not render it unconstitutional); *Connick v. Myers*, 461 U.S. 138 (1983) (upholding discharge of employee for expressing labor grievance); *Snepp v. United States*, 444 U.S. 507 (1980) *aff'd per curiam* (upholding sanctions against CIA agent for breaching an agreement to submit all writings about his service for prepublication review); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (upholding the Hatch Act's ban on political campaigning by federal employees); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947) (same). *See also* Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum.L.Rev. 321, 322 (1935) ("Despite the broad language in which the doctrine of unconstitutional conditions has been laid down, it is not the law that the exertion of a power is always unconstitutional when its purpose is to induce the foregoing of constitutional rights. The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them.").

In contrast to the approaches exemplified by *Lovvorn*, 846 F.2d 1539 (6th Cir. 1988), and *Weinberger*, 651 F.Supp. 726 (S.D. Ga. 1986), the Supreme court has consistently applied a balancing test to determine what conditions on the receipt of a governmental benefit are permissible and what conditions are not. Guided by these decisions, as well as the underlying purposes of the unconstitutional conditions doctrine, I would hold that the unconstitutional conditions analysis in the context of a Fourth Amendment waiver should balance the asserted governmental interest in conditioning the benefit against the individual's interest is not being requested to waive Fourth Amendment rights in order to receive that benefit.

**B**

In upholding the conditioning of governmental benefits, the Court has regularly considered the asserted governmental interest in imposing those conditions. The governmental interest is then balanced against the interest of the recipient in order to assess whether the imposition of the condition is constitutionally permissible. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 971-73 (1982) (state's interest in preventing officeholders from vacating office prior to the end of term is sufficient to outweigh interference with first amendment rights) and *Connick v. Myers*, 461 U.S. 138 (1983) (upholding discharge of an employee after balancing employee's first amendment interests against the state's interest in promoting efficiency). *See also* Sally Lynn Meloch, Note, *An Analysis of Public College Athlete Drug Testing Programs Through the Unconstitutional Conditions Doctrine of the Fourth Amendment*, 60 S.Cal.L.Rev. 815, 832 (1987) ("the unconstitutional condition doctrine reflects a balancing of the penalty against the justification"). There is no reason to assume that such a consideration is inapplicable in the context of a Fourth Amendment waiver. *See Wyman v. James*, 400 U.S. 309, 318-24 (1971) (considering, *in dicta*, the governmental interest in requiring consent to home visitations in order to receive, or continue receiving, Aid to Families with Dependent Children benefits). Thus, one factor which must be considered in reviewing the trial court's unconstitutional conditions ruling is the asserted governmental interests in imposing the condition.

The next question is what factors are to be weighed against the governmental interest. The Supreme Court has stressed, particularly in the area of individual rights, that the problematic aspect of unconstitutional conditions is the coercive element they impose on the rightsholder. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) ("the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (invalidating denial of unemployment benefits to Seventh-Day

Adventists who declined to work on Saturday concluding that the state had brought "unlawful coercion to bear on the employee's choice" between worship and work). *Cf. Coppage v. Kansas*, 236 U.S. 1, 21 (1915) ("To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms."); *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952) (public school teachers barred from subversive activities retain the choice of working subject to restrictions or of maintaining "their beliefs and associations and go[ing] elsewhere"). *See also* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, The Supreme Court Term 1987, 102 Harv.L.Rev. 5, 7 (1988) (unconstitutional conditions doctrine holds that the government "cannot grant [a] privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1415, 1428-42 (1989) (and authority cited therein, but concluding that "coercion" itself is an insufficient rationale to support the unconstitutional conditions doctrine). Thus, a court must determine whether, and the extent to which, the condition operates so as to coerce the beneficiary into waiving his rights.

In determining what conditions are impermissible, the Court has regularly considered the importance of the governmental benefit which is subject to the condition. For example, in rejecting Indiana's defense of a welfare regulation which granted unemployment benefits only to those whose termination was for "good cause [arising] in connection with work," against a free exercise challenge, the Court in *Thomas v. Review Board*, 450 U.S. 707 (1981), concluded that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . . the infringement upon free exercise is . . . substantial." *Id* at 717-18.

Similarly, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated an Arizona statute which imposed a durational residency requirement as a condition to an indigent's eligibility for nonemergency hospitalization or medical care. After characterizing *Shapiro v. Thompson*, 394 U.S. 619 (1969), as a case which forbade the "denial of the basic 'necessities of life'" on the exercise of constitutional rights, *Memorial Hospital*, 415 U.S. at 259, the Court explained that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.* Because the Arizona statute granted the receipt of a benefit "necessary to basic sustenance," in such a way as to penalize the right to interstate travel, the law was invalidated.

Though the rationale has not been expressly stated, in my opinion, the significance of the benefit must be taken into account for the simple reason that the greater the benefit, the greater the beneficiary's relative lack of freedom to refuse it; and, accordingly, accept the conditions attached to its receipt. In short, the greater the benefit the greater the coercion that is brought to bear by conditioning that benefit on the waiver of a constitutional right.

Thus, the unconstitutional conditions doctrine, in the context of a Fourth Amendment waiver, requires a balancing of the significance of the benefit of participating in intercollegiate athletics against the asserted governmental interest in imposing the condition that one waive the Fourth Amendment rights. Applying this analysis to the facts of this case, I conclude that the required waiver does not impose an unconstitutional condition on student athletes who attend CU and participate in CU's athletic program.

C

While CU's drug-testing program conditions the receipt of a governmental benefit on the waiver of a constitutional right, the

opportunity to participate in intercollegiate athletics is undoubtedly a benefit of far less import when compared to other governmental benefits, the conditioning of which have been sanctioned by the Court. *See, e.g., Thomas*, 450 U.S. 707 (1981) (unemployment benefits); *Snepp v. United States*, 444 U.S. 507 (1980) (employment with CIA); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (government employment); *Zap v. United States*, 328 U.S. 624 (1946) (government contracts). See also *Wyman v. James*, 400 U.S. 309 (1971) (concluding, hypothetically, that receipt of welfare benefits could be conditioned on waiver of Fourth Amendment rights). Moreover, because participation in intercollegiate athletics is not necessary to basic sustenance, it is deserving of no greater constitutional protection than less essential forms of governmental benefits. *See Memorial Hospital*, 415 U.S. at 259.

Consequently, I would hold that given the governmental benefit at issue here, imposing the condition that the recipient waive his Fourth Amendment rights is relatively insignificant. While this determination obviously cannot be quantified, it is clear that under Supreme Court precedent far less coercion is involved here than in cases where much greater benefits, indeed, "the basic necessities of life," were constitutionally conditioned on the waiver of constitutional rights. *See Wyman*, 400 U.S. 318-26 (stating, *in dicta*, that conditioning welfare benefits on the waiver of Fourth Amendment rights is constitutionally permissible).

I suppose that the benefit of participating in intercollegiate athletics, with all its accoutrements, is indeed of same value to student athletes.[5] However, its value to potential recipients does

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[5] I do not assume, however, that the benefit to student athletes is primarily, or in many cases even significantly, one of educational opportunity and growth; although I readily acknowledge that "the opportunity to participate in intercollegiate athletics is of substantial economic value to many students." *California State Univ., Hayward v. National College Athletic Ass'n*, 47 Cal. App.3d 533, 121 Cal. Rptr. 85, 90 (1975). While not true for all college sports, the fact that "to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth

*(footnote continues)*

not outweigh the governmental interest in imposing the condition on its enjoyment.

CU has asserted several interests which it seeks to further by imposition of its drug-testing program. These include CU's desire to prepare its athletes for drug testing in NCAA championship events, promoting the integrity of its athletic program, preventing drug use by other students who look to athletes as role models,[6] ensuring fair competition, and protecting the health and safety of intercollegiate athletes. In my opinion, most of these interests are valid and significant.

Thus, I am of the opinion that requiring student athletes to consent to CU's drug-testing program as a condition of participation in CU's athletic program does not impose an unconstitutional condition on the receipt of that governmental benefit.

Accordingly, I would hold that the CU drug-testing programs at issue here are constitutionally valid. Therefore, I respectively dissent.

I am authorized to say that JUSTICE ERICKSON joins in this dissent.

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*(footnote continued)*

more in economic terms than the chance to get a college education," *id.*, has propagated the rather unfortunate climate in which "[i]t cannot be seriously maintained that college football is not a business, or that the relationship between a college and student-athlete is not a business relationship." *Barile v. University of Virginia*, 2 Ohio App. 3d 233, 441 N.E.2d 608, 615 (1981).

In my opinion, the beneficiaries of this "business" whose interest are given primary concern and attention are not the student athletes who attend college, but the legions of coaches, trainers, and the like as well as the universities themselves who stand to gain financially by enlisting athletes in the university's athletic program. Given the university's rather obvious raison d'etre, such prioritizing is, to put it mildly, misguided.

[6] Although the role model rationale was offered, I can hardly believe that even the most naive freshman student would look to college athletes as role models in light of the well-documented abuses of nationally recognized intercollegiate athletic programs.

**JUSTICE ERICKSON dissenting:**

Certiorari was granted to review the drug-testing program employed to test intercollegiate student athletes at the University of Colorado, Boulder (CU). We agreed to answer two specific questions.

> In the context of the University's drug-testing program, whether suspicionless drug testing is constitutionally reasonable?
>
> Whether student athletes can give valid consent to the University's drug-testing program if their consent is a condition of participation in intercollegiate athletics at the University?

These two questions address the same issue — whether drug testing of student athletes at CU, conducted without either probable cause or reasonable suspicion, is nevertheless "reasonable" and therefore constitutionally permissible.

If a student athlete voluntarily consents to a drug-testing program before entering the intercollegiate athletic program, the answer is obvious. Such a warrantless search based on voluntary consent is constitutionally permissible even absent reasonable suspicion or probable cause. *See infra* part II. If there is no valid consent, however, the answer is more difficult and requires a balancing of CU's asserted interests against a student athlete's privacy expectations to determine whether the warrantless search is reasonable, and therefore constitutionally permissible. *See infra* part I. Because I answer the two questions on which we granted certiorari in the affirmative, I dissent.

## I

The Fourth Amendment to the United States Constitution and article II, section 7 of the Colorado Constitution establish the right to be free from unreasonable searches and seizures. *People v. McKinstrey*, 852 P.2d 467, 470 (Colo. 1993); *see also People v. Hillman*, 834 P.2d 1271, 1273 (Colo. 1992). I agree with

the majority that CU's drug-testing program for intercollegiate student athletes must satisfy the reasonableness requirement of the Fourth Amendment to the United States Constitution and article II, section 7 of the Colorado Constitution because the collection and testing of urine is a "search." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *People v. Williams*, 192 Colo. 249, 257-59, 557 P.2d 399, 405-07 (1976); *see generally* 3 Wayne R. LaFave, *Search and Seizure* § 10.3, at 189 (1993 Supp.).[1] The first question on which we granted certiorari concerns whether suspicionless drug testing of student athletes in the context of CU's drug-testing program is an unreasonable search. In my view, it is reasonable and therefore constitutionally permissible.

**A**

In issuing the permanent injunction, the trial court concluded that any drug-testing program of student athletes administered

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[1] In determining whether an intrusion is a search under article II, section 7 of the Colorado Constitution, this Court has occasionally diverged from the United States Supreme Court. *E.g., People v. Oates*, 698 P.2d 811 (Colo. 1985). On these occasions, this Court has determined that article II, section 7 provides more protection than does the similarly worded Fourth Amendment to the United States Constitution based on an individual's legitimate expectation of privacy. In this case, however, CU does not dispute on appeal that the drug-testing program is a search for constitutional purposes.

Accordingly, while my discussion of the reasonableness of the search at issue in this case is limited to Fourth Amendment decisions, the logic applies with equal force to article II, section 7. In this case, there is no basis for applying a different standard to test the reasonableness of the search under article II, section 7 than the standard applied to a search under the Fourth Amendment. *See People v. Rister*, 803 P.2d 483, 490 (Colo. 1990) (concluding that Fourth Amendment balancing test used to determine whether checkpoint stops were reasonable also applied to article II, section 7); *see also Exotic Coins, Inc. v. Beacom*, 699 P.2d 930, 943 (Colo.), *appeal dismissed*, 474 U.S. 892 (1985).

by CU must be premised on probable cause to satisfy the reasonableness requirement of the Fourth Amendment.[2] The court of appeals disagreed with the trial court and stated that reasonable suspicion has been approved as a basis to validate warrantless searches in certain circumstances. *Derdeyn v. University of Colorado*, 832 P.2d 1031, 1035 (Colo. App. 1992). The court of appeals therefore reversed that portion of the trial court's order prohibiting all drug testing of student athletes not premised on probable cause. *Id.* at 1035-36. While the majority expresses no opinion on the conclusion of the court of appeals, maj. op. 56 [863 P.2d at 950] n. 37, neither party claims that the court of appeals erred in this respect.

We granted certiorari, however, to consider the broader question addressed by the trial court, but left unanswered by the court of appeals — whether the drug-testing program in this context, premised on neither probable cause nor reasonable suspicion, is nevertheless constitutionally reasonable. The majority concludes that suspicionless drug testing of student athletes at CU is unreasonable.[3] I disagree.

**B**

The question of whether a suspicionless drug-testing program is constitutionally permissible absent probable cause or reasonable suspicion is not a question of fact, but is a question of law that is subject to de novo review on appeal. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1298 (9th Cir. 1991). Applying settled principles of constitutional adjudication to the case before us, I conclude that within the context of CU's drug-testing program for student athletes, suspicionless drug

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[2] The trial court concluded that drug testing based on reasonable suspicion was no more sustainable than suspicionless drug testing.

[3] Specifically, the majority holds that "for the purposes of the Fourth Amendment and Article II, Section 7, of the Colorado Constitution, CU's intercollegiate student athletes do not voluntarily consent to being searched pursuant to the drug-test program." Maj. op. at 54 [863 P.2d at 949-950].

testing satisfies the reasonableness requirement of the Fourth Amendment.

As a general matter, a search must be supported by a warrant issued upon probable cause to satisfy the Fourth Amendment reasonableness requirement. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). It is well-settled, however, that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Id.* Accordingly, where a Fourth Amendment intrusion serves special governmental needs, as in this case, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 665-66; *Skinner*, 489 U.S. at 624; *see also O'Connor v. Ortega*, 480 U.S. 709, 719 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

The balancing test is used to determine whether a search must be supported by probable cause, reasonable suspicion, or possibly neither, in order to be reasonable. Where the balancing test precludes insistence on a showing of probable cause, the Supreme Court has "usually required some quantum of individualized suspicion before concluding that a search is reasonable." *Skinner*, 489 U.S. at 624. The showing of individualized suspicion is not a constitutional floor, however, below which a search must be presumed unconstitutional. *Id.*

In fact, the Supreme Court on two occasions has employed the balancing test to uphold drug testing as reasonable, despite the absence of any individualized suspicion. *See Von Raab*, 489 U.S. at 679; *Skinner*, 489 U.S. at 624; *see also Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoint conducted without any individualized suspicion based on the balancing test). In these "limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the

intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. *Skinner*, 489 U.S. at 624.[4]

The question in this case is whether CU's particular drug-testing program directed at intercollegiate student athletes falls within the circumstances where a warrantless search can be upheld as reasonable, despite the absence of any individualized suspicion. To answer this question, it is necessary to engage in a balancing of the interests asserted by CU and the student athletes' expectations of privacy.

1

*Asserted Governmental Interests*

The majority's analysis of the asserted interests offered by CU to support its suspicionless drug-testing program for student athletes is limited to the observation that CU asserts no significant public safety interests, maj. op. at 43 [863 P.2d at 945], and the questioning of whether some of the interests asserted by CU are even significant for Fourth Amendment purposes. *Id.* I disagree with this analysis and conclude that CU's implementation of its suspicionless drug-testing program for student athletes serves important and valid public interests, including protecting the health and safety of intercollegiate student athletes and preventing drug use by other students who look to student athletes as role models.

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[4] Under the limitations set forth by the Supreme Court, the governmental interest need not be compelling. *Taylor v. O'Grady*, 888 F.2d 1189, 1195 n.8 (7th Cir. 1989); *see also Dimeo v. Griffin*, 943 F.2d 679, 683 (7th Cir. 1991) (en banc). Instead, where an individual's privacy interests are weaker, the government need only make a lower showing of countervailing harms, and a valid or substantial interest may be sufficient to justify the conclusion that a suspicionless search is reasonable. *Dimeo*, 943 F.2d at 681; *Willner v. Thornburgh*, 928 F.2d 1185, 1188 (D.C. Cir.), *cert. denied sub nom., Willner v. Barr*, ___ U.S. ___, 112 S. Ct. 669 (1991); *Taylor*, 888 F.2d at 1195 n. 8.

Drug usage involves considerable risks to the health and safety of student athletes, whether or not the student athlete is impaired during practice or competition. These dangers are particularly evident with respect to anabolic steroids, which pose a serious risk to the health and safety of athletes. Protecting the health and safety of student athletes unquestionably constitutes an important interest. *See Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1321 (7th Cir. 1988); *O'Halloran v. University of Washington*, 679 F.Supp. 997, 1002, 1006-07 (W.D. Wash), rev'd on other grounds, 856 F.2d 1375 (9th Cir. 1988); *see also Dimeo v. Griffin*, 943 F.2d 679, 682-83 (7th Cir. 1991) (en banc).

Preventing drug use by other students who look to student athletes as role models also constitutes an important interest. As noted in *Schaill:*

> Because of their high visibility and leadership roles, it is not unreasonable to single out athletes and cheerleaders for special attention with respect to drug usage. This court may take judicial notice of the fact that in the society at large drug usage by athletes is highly publicized and is a matter of great concern. Drug usage by this widely admired group is likely to affect the behavior of others and school authorities are within their discretion in conducting a program specifically directed at athletes.

*Schaill*, 864 F.2d at 1320-21. As the majority concedes, the desire to prevent drug use by other students is a significant public safety interest. Maj. op. at 43 [863 P.2d at 945] n. 30.

The asserted governmental interests need not rise to the level of a compelling interest. *See supra* note 4. Nor must the asserted interests be related to issues of public safety or national security to be valid. As such, I conclude that the interests asserted by CU are not just commendable, but are valid, significant, and important. Against these valid interest, it is necessary to weigh the interference with student athletes privacy expectations that results from requiring student athletes to undergo a urine test. *Von Raab*, 489 U.S. at 671.

2

*Expectations of Privacy*

The interference with individual privacy that results from the collection of urine for subsequent analysis varies depending on the circumstances. *Von Raab*, 489 U.S. at 671; *Dimeo*, 943 F.2d at 682. The Supreme Court has recognized that certain types of individuals have diminished expectations of privacy even with respect to such personal searches. *Von Raab*, 489 U.S. at 671.

In this case, I conclude that the student athletes who are subject to CU's drug-testing program have similarly diminished privacy expectations with respect to the intrusions occasioned by a urine test. The following factors all militate in favor of my conclusion: (1) student athletes are subject to regular and routine physical examinations; (2) student athletes voluntarily submit to extensive regulation of their personal behavior; and (3) a communal locker room atmosphere is commonplace in intercollegiate athletics. I examine each consideration separately.

Because the physical condition of a student athlete is a primary focus of intercollegiate athletics, student athletes are routinely physically examined to determine fitness to compete. *See Dimeo*, 943 F.2d at 682 (recognizing that athletes must submit to frequent medical examinations); *Schaill*, 864 F.2d at 1318 (stating that physical examinations are integral to athletic programs). Unlike most private citizens or other students, student athletes reasonably expect routine inquiry into their fitness. *Cf. Von Raab*, 489 U.S. at 655. As part of their annual medical examinations, student athletes provide urine samples under circumstances similar to those used in CU's drug-testing program. Throughout the year, student athletes also undergo close physical contact with both trainers and medical personnel in the course of being examined, diagnosed, and treated for injuries or potential injuries. *See O'Halloran*, 679 F.Supp. at 1005 (recognizing that in the context of athletic examinations, viewing and touching is tolerated among relative strangers that would be firmly rejected in other contexts). Based on this continuing physical examination

and close physical contact with trainers and medical personnel, student athletes have diminished expectations of privacy with respect to the intrusions occasioned by a urine test. *See Dimeo*, 943 F.2d at 682 (stating that the affront to privacy that is caused by the giving of a urine sample is slight for people who are subject to frequent examinations).

The extensive regulation of behavior that student athletes voluntarily submit to further reduces their privacy expectations. Student athletes are regulated by the National Collegiate Athletic Association (NCAA), the Big 8 Conference, CU, and their individual athletic programs. Among others, the regulations include maintenance of required levels of academic performance, monitoring of course selection, training rules, practice schedules, weight and diet restrictions, curfews, and prohibitions on drug use. Significantly, student athletes at CU are already subject to the NCAA drug-testing program which mandates suspicionless urine testing of student athletes. In my view, the expectation of privacy of student athletes with respect to the intrusions occasioned by a urine test are greatly diminished based on their voluntary participation in the highly regulated area of intercollegiate athletics. *Cf. Skinner*, 489 U.S. at 627 (stating that "expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees"); *International Bhd. of Teamsters*, 932 F.2d at 1300 (concluding that the privacy expectations of commercial truck drivers are diminished because they voluntarily choose to enter a highly regulated profession); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.) (recognizing that privacy expectations of jockeys are diminished because of the regulated nature of the sport), *cert. denied*, 479 U.S. 986 (1986).

The privacy expectations of student athletes with respect to the intrusions occasioned by a urine test are also diminished because of the communal atmosphere of locker rooms that is commonplace in intercollegiate athletics. By its very nature, a

locker room setting consists of communal undress, showering, and urination. *See Schaill*, 864 F.2d at 1318; *O'Halloran*, 679 F.Supp. at 1005. In this context, it is difficult to conclude that student athletes do not have reduced privacy expectations in being required to submit a urine sample for testing purposes.

These considerations all make it clear that participation in intercollegiate athletics is quite distinguishable from almost any other activity. *See Schaill*, 864 F.2d at 1318. The distinctive circumstances that diminish student athletes' expectations of privacy, however, do not extend beyond the limited identifiable group of intercollegiate student athletes to other groups, including collegiate students as a whole. No other group is subject to routine physical examinations, submits to extensive regulation of their behavior, and encounters a communal locker room atmosphere on a routine basis. Based on a combination of these factors, it is implausible to conclude that student athletes have strong expectations of privacy with respect to submitting urine samples for testing purposes. *Schaill*, 864 F.2d at 1319; *O'Halloran*, 679 F.Supp. at 1005.

In addition, CU has designed its drug-testing program for student athletes to significantly minimize the impact on their privacy interests. CU has attempted to reduce the intrusiveness of the collection process in a number of ways.[5] In my view, the

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[5] Under CU's drug-testing program, the intrusion on privacy is reduced because there is no direct observation of the act of urination. *Von Raab*, 489 U.S. at 672-73 n. 2; *Willner*, 928 F.2d at 1189; *Schaill*, 864 F.2d at 1318. The notice provided by the consent forms also significantly diminishes the subjective intrusiveness of the urine testing by reducing to a minimum any "unsettled show of authority" that may be associated with unexpected intrusions on privacy. *Von Raab*, 489 U.S. at 672-73 n. 2; *Delaware v. Prouse*, 440 U.S. 648, 657 (1979); *Schaill*, 864 F.2d at 1320. The drug-testing program is also designed to assure that the student athletes' expectations of privacy are not subject to the discretion of the officials in charge of the program. *Schaill*, 864 F.2d at 1321. Finally, the urine samples may be examined only for specified drugs, and the use of samples to test for other purposes is not authorized. The combination of these procedures reduces the intrusiveness on the student athletes' expectations of privacy.

procedures prescribed by CU for the collection and analysis of the urine samples do not carry the grave potential for arbitrary and oppressive interference with an individual's privacy interests that the Fourth Amendment was designed to prevent. *Von Raab*, 489 U.S. at 672 n. 2.

3

*Outcome of the Balancing Test*

It is clear that CU has asserted important interests to justify its drug-testing program for student athletes and that student athletes, as a group, have diminished privacy expectations based on their unique circumstances. Based on the interests CU has asserted, it designed a drug-testing program for student athletes to minimize the impact on their privacy interests by reducing the intrusiveness of the collection process. Because the drug testing contemplated in this limited context does not constitute an undue infringement on the student athletes' expectations of privacy, I conclude that CU's asserted interests outweigh the privacy concerns.

The examination of the asserted governmental interests and the privacy expectations is only the initial step under the test delineated by the Supreme Court. The purpose of balancing these factors is to determine whether it is impractical to require the government to obtain a warrant or establish some level of individualized suspicion before it is permitted to conduct the search. *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619-20; *Schaill*, 864 F.2d at 1313.

In this case, the student athletes do not contend that either a warrant or probable cause is required by the balance of privacy and governmental interests. Nor does it appear that such an assertion could withstand scrutiny. *See Von Raab*, 489 U.S. at 666-68; *Skinner*, 489 U.S. at 624; *cf. Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (stating that the probable-cause standard "is peculiarly limited to criminal investigations"); *South Dakota v. Opperman*, 428 U.S. 364, 370 n. 5 (1976) (same). Rather, the

student athletes assert that CU must, at a minimum, premise its drug-testing program for student athletes on reasonable suspicion. I disagree.

In my view, suspicionless drug testing of student athletes in this limited context is reasonable under the Fourth Amendment. To achieve the important interests asserted by CU, it is necessary to accurately detect drug use among the student athletes. As the trial court suggested, however, it is nearly impossible to ever establish reasonable suspicion of drug use among student athletes. *Cf. O'Halloran*, 679 F.Supp. at 1006. The important interests asserted by CU therefore would be placed in jeopardy, and CU's efforts to achieve these goals significantly hampered, if it were required to point to specific facts giving rise to a reasonable suspicion before testing a student athlete. *See Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 624, 631, 633; *see also Dimeo*, 943 F.2d at 685; *Schaill*, 864 F.2d at 1322; *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (noting that requiring particularized suspicion before routine stops on major highways near the U.S.-Mexico border would be impractical). These facts, combined with the diminished privacy interests implicated by the drug testing of intercollegiate student athletes, lead me to conclude that the suspicionless drug testing of student athletes in this limited context is a reasonable search.

Because suspicionless drug testing of intercollegiate student athletes in this context is reasonable, CU's drug testing program is constitutionally permissible. Even were I to agree, however, that a drug-testing program based on no individualized suspicion was unreasonable in this context, such a search nevertheless could be constitutionally permissible based on the valid consent of the student athletes.[6] It is therefore necessary to examine the question of the student athletes' consent in this case.

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[6] A warrantless search is constitutionally permissible under the Fourth Amendment if an individual student athlete has voluntarily consented to it, regardless of whether the search is conducted based on probable cause, reasonable suspicion, or no suspicion at all. *See Schneckloth v. Bustamonte*,

*(footnote continues)*

## II

Based on its reading of the trial court order, the majority affirms what it characterizes as the trial court's "finding of fact" that the individual student athletes within the certified class did not voluntarily consent to CU's drug-testing program for student athletes. Maj. op. at 47 [863 P.2d at 947].[7] As a result, the majority does not reach the second issue on which we granted certiorari. *See* maj. op. at 16-17 [863 P.2d at 935].

Because I disagree with the majority's characterization of the trial court order, and instead would find that the trial court concluded as a matter of law that no student athlete could validly consent to the drug testing program, I am compelled to address the second question on which we granted certiorari. I would

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*(footnote continued)*

412 U.S. 218 (1973); *see generally* 3 Wayne R. LaFave, *Search and Seizure* § 8.1 (1987 & 1993 Supp.). The majority's conclusion that the consent at issue in this case was not voluntary as a factual matter does not negate the elementary proposition that a warrantless search based on voluntary consent would be constitutionally permissible even absent reasonable suspicion.

[7] The class certified pursuant to C.R.C.P. 23 consists of:

> Those present and prospective undergraduate student athletes who are or will be subject to the University of Colorado intercollegiate athletic department's drug education program as a condition of participation in the University of Colorado intercollegiate athletic program limited as follows: Those present undergraduate student athletes who have never tested positive or have been subject to discipline or sanction as a result of a positive test result; and those present student athletes, who, although having executed waivers, consents or agreements to participate in the University of Colorado's drug education program, object to the program as being an unconstitutional condition of participation; and lastly, those prospective undergraduate student athletes who will execute waivers, consents or agreements to participate in the University of Colorado's drug education program, but who object to the program as being an unconstitutional condition of participation.

conclude that CU may validly condition a student athlete's participation in intercollegiate athletics on a student athlete's knowing and voluntary consent to a drug-testing program.

## A

I agree with the majority that as an appellate court, "we must defer to the trial court's findings on the factual issue of voluntariness unless its findings are clearly erroneous or not supported by the record." Maj. op. at 46 [863 P.2d at 946] (citations omitted). This rule of deference, however, is limited to factual findings contained in a trial court's order and not to the trial court's legal conclusions, which we review de novo.

In my view, the majority avoids answering the question on which we granted certiorari by erroneously characterizing the trial court's legal conclusions on the question of consent as findings of fact. Maj. op. at 47. It is clear from a plain reading of the trial court's order that it made no findings of fact regarding the validity of consent given by any individual member of the class. Instead, the trial court relied on the unconstitutional conditions doctrine to conclude as a matter of law that no student athlete could validly consent to a drug-testing program.

The sole factual finding made by the trial court with regard to the consent issue related to all student athletes, and *nowhere* in the trial court's order is there a factual determination that *any* individual class member failed to give voluntary consent or was in any way influenced by duress or coercion.[8] The factual findings relating to consent that the majority defers to actually appear

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[8] In its only factual finding regarding the consent issue, the trial court stated:

> In all phases of the program the student athletes have been required to sign a "consent" form in order to participate in intercollegiate athletics. If a student does not sign the form the student may not participate in intercollegiate athletics at the University.

within the trial court's order as "conclusions of law."[9] This is not surprising, because the broad injunctive relief granted by the trial court is appropriate only if the trial court decided the voluntary consent issue based on the unconstitutional conditions doctrine.[10]

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[9] In reaching the determination that the trial court's factual findings are not clearly erroneous, the majority fails to acknowledge that the language it cites from the trial court's order is contained in the section labeled conclusions of law and relate entirely to the trial court's legal determination that CU may not constitutionally condition an athlete's participation in athletics on the signing of a consent form. The trial court concluded that:

> The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary. It is quite clear that *they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent.* As in the cases cited, the "consent" obtained by the University is not voluntary . . . .

[10] The trial court permanently enjoined CU from requiring any urine samples from student athletes for the purposes of drug testing. In other words, the order struck down all drug-testing programs as they relate to all student athletes and not just class members. Thus, even if CU could demonstrate that any of its present or future student athletes voluntarily consented to the drug-testing program, CU would still be enjoined from conducting any drug-testing program.

Such a broad-based injunction would be warranted if the student athletes' unconstitutional conditions claim was valid. In such a case, the conditioning of the right to represent CU on the signing of the consent form would preclude any student athlete from voluntarily consenting to the drug-testing program. On the other hand, such a broad injunction would be inappropriate if the trial court believed that the class representatives, and therefore the class, did not voluntarily consent as a matter of fact to the drug-testing program. In such a case, the drug-testing program would have been enjoined as to the class, but not as to all student athletes.

Moreover, it is implausible to contend that the trial court could have entered the injunction as to the group of "prospective undergraduate student athletes" without relying on the unconstitutional conditions doctrine. It would have been impossible for the trial court to conclude as a matter of fact that this group did not voluntarily consent to the drug-testing program insofar as no representative of the group appeared before the trial court. Simply stated, there are no factual findings for the majority to defer

*(footnote continues)*

The foregoing considerations all suggest that the trial court concluded, *as a matter of law*, that the consents given by CU student-athletes were not voluntary and did not exempt CU from the constitutional requirements of the United States and Colorado Constitutions. Accordingly, I disagree with the majority's unnecessary deference to the trial court's legal conclusions and would reach the unconstitutional conditions issue squarely presented by both the trial court's order and the issue on which we granted certiorari.[11]

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*(footnote continued)*

to on the question of whether prospective student athletes consented to an unspecified future random drug-testing program.

The effect of the majority opinion is to uphold the trial court's legal determination that this group of individuals who, even though they have not yet considered whether they wish to attend CU to participate in athletics or whether they wish to consent to a random drug-testing program, are incapable of voluntarily consenting to any random drug-testing program. Only with the assistance of the unconstitutional conditions doctrine could the trial court have declared that all student athletes, including the as yet undetermined group of prospective student athletes, were incapable of giving consent as a matter of law.

[11] We denied certiorari on the issue of whether we should decertify this case as a class action. Specifically, that issue was:

> Did the court of appeals err in sustaining a class action judgment on grounds that apply only to a few members of the class.

In my view, our denial of certiorari on the decertification of class issue was justified at that time because we granted certiorari to resolve the voluntariness of consent issue on the basis of the unconstitutional conditions doctrine. The majority, by refusing to decide the unconstitutional conditions issue, calls into doubt the legal underpinnings of the original class certification because the record contains no support for the majority's deference to the trial court's "factual determinations" as representative or typical of all of the members of the class. For example, it is unclear to me how permanent injunctive relief could be granted in this case to an entire group of individuals, such as prospective student athletes, if no member of that group appeared before the trial court or testified about their individual experiences regarding the voluntariness of consent that would be obtained from them at some time in the future. *See supra* note 10.

*(footnote continues)*

**B**

An unreasonable search is nevertheless constitutionally permissible when it is conducted based on voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The question presented on appeal is not whether certain individual student athletes voluntarily consented to the drug-testing program of student athletes, but whether all student athletes at CU cannot voluntarily consent, as a matter of law, if their consent is a condition of their participation in intercollegiate athletics. The student athletes contend, and the trial court concluded, that representing CU in intercollegiate athletics cannot be conditioned on their giving consent to a random drug-testing program. I disagree.

The unconstitutional conditions doctrine relied on by the trial court in reaching its legal conclusion derives from *Perry v. Sindermann*, 408 U.S. 593 (1972). *Perry* stated:

> Even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests — especially his interest in freedom of speech.

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*(footnote continued)*

Fundamental fairness should dictate that CU should not be permanently enjoined from conducting a random drug-testing program in the future, nor should student athletes be precluded from participating in such a program, so long as it can be established that the student-athletes voluntarily consent to participate. If we are going to purposefully avoid application of the unconstitutional conditions doctrine in this case, we should address the question of whether the representatives who appeared and testified before the trial court are typical of *all* members of the certified class. *See* C.R.C.P. 23(a)(3) (stating that one or more members of a class may sue as representative parties on behalf of all "only if the claims or defenses of the representative parties are typical of the claims or defenses of the class").

*Id.* at 597. The determination of whether the unconstitutional conditions doctrine precludes consent from ever being voluntary involves a balancing of the governmental interests involved and the benefit that will be lost if consent is not given.

The Supreme Court repeatedly has held that governmental benefits far more significant than participation in intercollegiate athletics can be conditioned on waiving the exercise of a constitutional right. *See, e.g., Snepp v. United States*, 444 U.S. 507 (1980) (employment with the Central Intelligence Agency (CIA) can be conditioned on an employee's consent to pre-publication review and censorship of any publication concerning the CIA); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (governmental employment can be conditioned on the prohibition of partisan political activity by employees); *Wyman v. James*, 400 U.S. 309, 324 (1971) (receipt of welfare benefits can be conditioned on recipient's consent to inspection of home); *cf. Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) (post-graduate financial aid can be conditioned on draft registration without violating the Fifth Amendment privilege against self-incrimination).[12]

*Wyman v. James* is instructive on the issue of whether conditioning participation of student athletes in intercollegiate athletics on consent to a random drug-testing program is an unconstitutional condition. The case involved a Fourth Amendment challenge to an Aid to Families with Dependent Children

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[12] Commentators view this line of Supreme Court precedent as determinative of the question of whether conditioning participation in intercollegiate athletics on the signing of a consent form for drug-testing programs is constitutionally permissible. *E.g.*, Alex M. Johnson & James F. Ritter, *The Legality of Testing Student-Athletes for Drugs and the Unique Issue of Consent*, 66 Or.L.Rev. 895 (1987). These commentators conclude that there is presently no constitutional bar to conditioning participation in this manner. *See id.* at 921-22 (stating that "the Court has approved 'coerced consent' under circumstances closely analogous to the drug-testing procedures adopted by [various Universities] and the NCAA . . . . Short of the Court overruling itself on the consent issue, no other fourth amendment issues need be raised").

(AFDC) requirement that denied AFDC benefits to any program recipient who refused to consent to a caseworker "visitation" of their home. *Wyman*, 400 U.S. at 311-12. Government representatives informed Mrs. James, a recipient of AFDC benefits, that she would lose her benefits if she refused to consent to the visitation. *Id.* at 313-14. She brought suit for declaratory and injunctive relief, alleging that conditioning her AFDC benefits on the requirement that she consent to the visitation violated her Fourth Amendment right to be free from unreasonable searches.

In rejecting Mrs. James's Fourth Amendment claim, the Supreme Court stated:

> the visitation in itself is not forced or compelled, and [ ] the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

*Id.* at 317-18. The Supreme Court also added that "what Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms and to avoid questions of any kind." *Id.* at 321-22.

The factual situations presented in *Wyman* and the present case are analogous. The home visitation in *Wyman* and the drug testing in this case are not designed to gather evidence for use in a subsequent criminal prosecution, but ensure compliance with the requirements of the respective programs.[13] However, the

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[13] *Wyman stated:*

> The home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect.
>
> *Wyman*, 400 U.S. at 323.

benefit involved in this case, participation in intercollegiate athletics, is certainly less of a recognized interest than the benefit at stake in *Wyman*, the loss of State provided "necessities for life."[14] Moreover, the privacy interest in this case is certainly lower than in *Wyman*. *See supra* part I.B.2.

The consent to random drug testing is not a *per se* invalid for all student athletes at CU simply because it is a condition of representing the school in intercollegiate athletics. Student athletes remain free to withhold their consent to the drug-testing program or to individually challenge the voluntariness of their own consent. Alternatively, student athletes may decide to participate in intercollegiate athletics at colleges or universities with drug-testing programs more suitable to their individualized expectations of privacy. "The choice is entirely [theirs], and nothing of constitutional magnitude is involved." *Wyman*, 400 U.S. at 324.

## III

I would answer both of the questions on which we granted certiorari affirmatively. In the limited context before us, I conclude that suspicionless drug testing of intercollegiate student athletes is a reasonable search under the Fourth Amendment of the United States Constitution and article II, section 7 of the Colorado Constitution. I would also conclude that CU may validly condition student athletes' participation in intercollegiate athletics on a knowing and voluntary consent to the drug-testing program. Accordingly, I would reverse the judgment of the court of appeals.

CHIEF JUSTICE ROVIRA joins in this dissent.

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[14] Courts repeatedly have held that, unlike certain expectations like continued employment and attending college, participation in athletics is not a constitutionally protected interest because there is no legitimate expectation of continued participation. *See Bailey v. Truby*, 174 W.Va. 8, 321 S.E.2d 302, 314-15 (1984) and cases collected therein.

## APPENDIX B

COLORADO COURT OF APPEALS — December 19, 1991
No. 89CA2044

DAVID DERDEYN, individually and on behalf of all others similarly situated;

*v.*

*Plaintiffs-Appellees,*

UNIVERSITY OF COLORADO, BOULDER, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate, GORDON GEE, as President of the University of Colorado, Boulder, and; WILLIAM MAROLT, as Athletic Director, Department of Intercollegiate Athletics,

*Defendants-Appellants.*

APPEAL FROM THE DISTRICT COURT OF BOULDER COUNTY
Honorable Joseph J. Bellipanni, Judge
No. 86CV2245

Division III — JUDGMENT AFFIRMED IN PART
Opinion by Judge Plank — AND REVERSED IN PART
Tursi and Criswell, JJ., concur

[832 P.2d 1031]

This appeal concerns the constitutionality of the drug testing program for intercollegiate athletics at the University of Colorado (the University). Defendants, the University, its Board of Regents; its president, and its athletic director, appeal the judgment entered in favor of the class of student athletic plaintiffs which declared the testing program unconstitutional. We affirm in part and reverse in part.

In the 1984-85 academic year, the University instituted a drug testing program of participants in intercollegiate athletics because of a desire to prepare its athletes for drug testing in

NCAA sanctioned sporting events, a concern for athletes' health, an interest in promoting its image, and a desire to ensure fair competition.

The program underwent various changes through the years. It ranged from random testing of athletes on urine samples obtained under direct visual observation to a system which depended on "reasonable suspicion" based, in part, on random rapid eye examinations. If a student failed the rapid eye examination, he or she was required to submit to urinalysis. Each variation of the program allowed drug testing if "reasonable suspicion" was generated by means other than the rapid eye examination. Each variation also required that the students execute consents to testing as a condition to participation in intercollegiate athletics. Penalties for a positive test ranged from mandatory counseling to permanent suspension from athletics.

The student athletes filed this class action to challenge the constitutionality of the program. The complaint alleged that drug testing violates the student athletes' rights to be free from reasonable searches, to privacy, to due process of law, and to equal protection of the law.

After a bench trial, the trial court held that the program was unconstitutional as being violative of the student athletes' rights to freedom from unreasonable searches under the Fourth Amendment and Colo. Const. art. II, § 7. The court further held that the consent given by the students was coerced and, therefore, invalid. Accordingly, the court permanently enjoined all drug testing of intercollegiate athletes unless supported by probable cause.

Defendants do not appeal the trial court's findings relating to the rapid eye examinations, only those relating to urinalysis.

I.

Defendants first contend that the trial court erred in finding mandatory urinalysis a "search" subject to constitutional standards. This contention is without merit.

The United States Supreme Court has held that the collection and testing of urine constitutes a search under the Fourth Amendment. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

In *Skinner*, the Court stated:

> It is not disputed . . . that chemical analysis of urine, like that of blood can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
>
> 'There are few activities in our society more personal and private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.'
>
> . . .
>
> Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Likewise, the Colorado Supreme Court has held that the "extraction or compelled production of body fluids" is a

"search" under Colo. Const. art. II, § 7. *People v. Williams*, 192 Colo. 249, 557 P.2d 399 (1976) (the taking of a blood sample is a search requiring probable cause); *see also People v. Kokesh*, 175 Colo. 206, 486 P.2d 429 (1971) (police officers need probable cause to obtain a urine specimen).

Here, the parties stipulated that the University is a state institution and that the actions of the individual defendants constitute state action with regard to this case. Accordingly, we hold that the collection and testing of urine performed as part of the University's drug testing program is a "search" within the meaning of the Fourth Amendment and the Colo. Const. art. II, § 7.

**II.**

Defendants also contend that the trial court erred in holding that the search was unreasonable. We disagree.

**A.**

The Fourth Amendment is applicable to government searches undertaken for a purpose other than criminal law enforcement. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). However, special needs of the government, beyond the normal need for law enforcement, which make a probable cause requirement impracticable, may justify departures from the usual warrant and probable cause requirements under certain circumstances. *Skinner v. Railway Labor Executives Ass'n, supra. See also National Treasury Employees Union v. Von Raab, supra.*

The Fourth Amendment does not prohibit all searches and seizures, only those that are unreasonable. Reasonableness depends on all the circumstances surrounding the search itself. The intrusion on the individual's privacy interest is balanced against the promotion of compelling governmental interests. In limited circumstances, if the privacy interests involved are minimal, and if the compelling governmental interest would be

placed in jeopardy by a requirement of individualized probable cause, a search may be reasonable despite the absence of such probable cause. *Skinner v. Railway Labor Executives Ass'n, supra.*

As noted above, our society has long recognized that the collection and testing of urine intrudes upon expectations of privacy. The passing of urine is personal and private matter performed without public observation. *Skinner v. Railway Labor Executives Ass'n, supra.* A person does not ordinarily discharge urine expecting others to collect and analyze it. Hence, he has a legitimate expectation of privacy in personal information ascertainable from his bodily fluids.

In *Skinner v. Railway Labor Executives Ass'n, supra*, the Court upheld urine testing of certain railroad employees if they were involved in major train accidents. The federal regulations there at issue, which required the urine testing, were developed because of evidence that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant railroad accidents. In balancing the interests, the Court determined that the government had a compelling interest in public safety and individualized suspicion was not required.

Although the testing procedure required employees to perform an excretory function traditionally shielded by great privacy, the regulations required the execution of the urine test in a medical setting, and in the Court's view, this reduced the intrusiveness of the collection process. In addition, the Court concluded that the expectations of privacy of covered employees were diminished by their participation in an industry heavily regulated to ensure safety. Thus, the *Skinner* Court held that the government's compelling interest in prevention of disastrous railroad accidents outweighed the employees' diminished privacy interests.

In *Von Raab, supra,* the Court concluded that the government had demonstrated a compelling interest in safeguarding the nation's borders and the public's safety which outweighed the privacy interests of employees who seek promotion to positions

that directly involve the interdiction of illegal drugs or require the incumbent to carry a firearm. Thus, the Court upheld the urine testing of these employees as reasonable under the Fourth Amendment. *See also Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (annual urine testing of correctional officers who carry firearms or have regular access to inmates was upheld; however, the governmental interest in maintaining the integrity of the work force was insufficient to test all correctional employees); *National Federation of Government Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989) (random urine testing of air traffic controllers and pilots upheld, but testing of lab technicians lacked a clear, direct nexus to governments interest in public safety); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989) (random urine testing of top secret national security employees was justified, but testing of employees who deal with confidential government information was not justified).

Here, in our view, the University's interest in securing a drug-free athletic program does not constitute a compelling state interest which rises to the level required by *Skinner* and *Von Raab*. Certainly there are no public safety or law enforcement interests that are served by such sports program. Accordingly, we hold that the urine testing program here at issue is unconstitutional under the Fourth Amendment.

**B.**

The Colo. Const. art. II § 7 provides protection from privacy invasions in all instances in which the Fourth and Fourteenth Amendments would provide protection. And, in some instances, the state provision may protect against invasions that the federal constitution would not prohibit. *See e.g., People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980). Hence, because we have concluded that the urine tests here violate the strictures of the Fourth and Fourteenth Amendment, we also conclude that they are violative of the state constitution.

## III.

Defendants also contend that the trial erred in holding that the consent given by the student athletes was invalid. We disagree.

Although voluntary consent validates an otherwise unconstitutional search, the government bears the burden of proof in showing voluntariness. *People v. Carlson*, 677 P.2d 310 (Colo. 1984).

Further, the sufficiency and weight of the evidence and the inferences and conclusions drawn from it are matters for the trial court, and its disposition of an issue of fact will not be disturbed on appeal unless so clearly erroneous as to find no support in the record. *Dominion Insurance Co. Limited v. Hart*, 178 Colo. 451, 498 P.2d 1138 (1972).

Here, several athletes, representing the class, testified as to the circumstances under which each of them had signed the consent. That testimony revealed that, because of economic or other commitments the students had made to the University, they were not forced with an unfettered choice in regard to signing the consent.

Hence, we find sufficient evidence for the trial court to conclude that the University failed to demonstrate that the students voluntarily without coercion signed the consent forms and that conclusion is, thus, binding on appeal.

## IV.

We disagree, however, with the portion of the mandatory injunction prohibiting any drug testing of athletes except that premised on probable cause. The courts have carved out exceptions to the probable cause requirement. And, indeed, reasonable suspicion has been approved as a basis for a search in certain circumstances. *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988); *see New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed. 720 (1985).

Here, although the trial court acknowledged drug abuse as a national problem, no evidence was presented by defendants to indicate that student athletes used drugs more than other persons of similar age among the general population. In addition, no evidence of actual drug problems or drug related injuries among the University's athlete was found. Hence, the defendants failed to advance a compelling need based on actual student drug related problems. They also failed to develop objective, nondiscretionary criteria for reasonable suspicion. Consequently, an appropriate basis for a search was not established, but under different circumstances, the balance of interests could tip in favor of the defendants, and an appropriate testing program premised on an objective reasonable suspicion standard might well be constitutionally permissible. Hence, the injunction decree should address no more than the present testing procedures.

Accordingly, the permanent injunction entered by the trial court is affirmed insofar as it prohibits drug testing under the procedures previously in use by defendants. That portion of the decree that prohibits all testing not premised on probable cause is reversed.

JUDGE TURSI and JUDGE CRISWELL concur.

## APPENDIX C

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO

Case No. 86 CV 2245, Division 3

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER AND JUDGMENT

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Plaintiffs,*

*v.*

UNIVERSITY OF COLORADO, BOULDER, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; GORDON GEE, as President of the University of Colorado, Boulder, and; WILLIAM MAROLT as Athletic Director, Department of Intercollegiate Athletics,

*Defendants.*

On August 22, 1989, the following actions were taken in the above captioned case. The Clerk is directed to enter these proceedings in the register of actions.

APPEARANCES: Judd Golden for the Plaintiffs
Beverly Fulton for the Defendants
Court Reporter: Sharon Garone

In this class action, plaintiffs challenge the constitutionality of the University of Colorado's ("University") various drug-testing programs for intercollegiate athletes. The plaintiff class seeks declaratory and injunctive relief pursuant to Rules 57 and 65, C.R.C.P., and 42 U.S.C. section 1983. Trial was held on August 7-11, 1989, and the court now issues its findings, conclusions, order and judgment.

## I. FINDINGS OF FACT

The plaintiff class consists of:

> Those present and prospective undergraduate student athletes who are or will be subject to the University of Colorado intercollegiate athletic department's drug education program as a condition of participation in the University of Colorado intercollegiate athletic program limited as follows: Those present undergraduate student athletes who have never tested positive or have been subject to discipline or sanction as a result of a positive test result; and those present student athletes who, although having executed waivers, consents or agreements to participate in the University of Colorado's drug education program, object to the program as being an unconstitutional condition of participation; and lastly, those prospective undergraduate student athletes who will execute waivers, consents or agreements to participate in the University of Colorado's drug education program, but who object to the program as being an unconstitutional condition of participation.

The class was certified by stipulation on January 27, 1987.

The individual defendants are Gordon Gee, in his capacity as President of the University, and William Marolt, in his capacity as athletic director of the University. The parties have agreed that the University is a state institution, and that the actions of the individual defendants constitute state action for all purposes relevant to this case.

The University began a drug-testing program in the 1984-85 academic school year. That year the program required a urine test for certain proscribed drugs at the student's annual physical and random urine tests thereafter. In the years that followed the University has amended its program. The random urine tests were to be directly observed and monitored at one point in the program. The current program provides for random eye exams which are designed to reveal drug use. The word "drug" is currently defined to mean alcohol, amphetamines, barbiturates,

cocaine, methaqualudes, opiates/morphine, codeine, PCP ("angel dust") and analogues, tetrahydrocanibinol (THC), marijuana, and performance-enhancing substances such as anabolic steroids. If a student does not successfully complete the eye exam the student is required to provide a urine sample which is aurally monitored. Throughout the University's drug-testing program students have been required to provide urine samples if "reasonable suspicion" exists as defined by policy. "Reasonable suspicion" is presently defined to mean

a. Failure to perform adequately on the Rapid Eye Examination constitutes *prima facie* reasonable suspicion of drug use.

b. Exhibiting physical or behavioral characteristics indicating drug use including, but not limited to: tardiness, absenteeism, poor health habits, emotional swings, unexplained performance changes, and/or excessive aggressiveness.

c. With regard to use of steroids, the rapid eye examination is not used to establish reasonable suspicion. Reasonable suspicion for steroid testing is developed by observing physical or behavioral characteristics indicating steroid use.

d. With regard to the use of over-the-counter drugs, an athlete may be tested for use of over-the-counter drugs, which drugs are not included in the list of drugs in the definition section of this document, upon a finding of reasonable suspicion that the athlete is using over-the-counter drugs to a degree where the athlete's physical or mental well-being is impaired. Reasonable suspicion is developed by observing physical or behavioral characteristics indicating such drug use, and additionally may include the results of Rapid Eye Examinations. If such reasonable suspicion occurs, urine testing will be done and the outside laboratory will be directed to test for such over-the-counter drugs.

Urine tests are now tested for specific gravity, temperature and PH balance to ensure that they are reliable samples. The urine

sample is sent to a laboratory where it is screened by a radio immunoassay test. Any positive results are confirmed by a gas chromatography mass/spectrometry test. A sample remains for independent testing by the student if requested.

In all phases of the program the student athletes have been required to sign a "consent" form in order to participate in the intercollegiate athletics. If a student does not sign the form the student may not participate in intercollegiate athletics at the University.

The penalty for a result which is positive for the tested drugs has varied throughout the program. Initially the penalties required mandatory counseling for first positive, a seven day suspension for a second positive, and a one year suspension for a third positive. Currently, the University imposes a one year suspension for a first positive and permanent suspension for a second positive.

All of the various components of the University's prior and present drug-testing programs are at issue in this action. The University has refused to acknowledge that it will not return to former programs and the court has previously ruled that such a refusal requires a consideration of programs in effect at the time the suit was commenced as well as subsequent programs. Ruling, 3/16/89.

The University instituted and mandates the drug-testing program because of a desire to prepare its athletes for drug-testing in NCAA sanctioned sporting events, a concern for athletes' health, an interest in promoting its image, and a desire to ensure fair competition. Drug abuse is a substantial national problem. The eight drugs which are the subject of the urine screens are harmful to the health of student athletes. Most of the harmful effects of those drugs are reversed if the drugs are discontinued. There is no evidence to indicate that student athletes use drugs more often than other similar age members of the population. There is no evidence that the University instituted its program in response to any actual drug abuse problem among its student

athletes. There is no evidence that any person has ever been injured in any way because of the use of drugs by a student athlete while practicing or playing a sport. Anabolic steroids, a so-called "performance-enhancing" drug, can also be devastating to the health of athletes. Nicotine, the drug most addictive and damaging to health is not included in the University's program.

Obtaining a monitored urine sample is a substantial invasion of privacy. Elimination of this body fluid is a private matter and students subjected to direct observation are very embarrassed and uncomfortable and feel as though their privacy has been invaded. They are resentful that they must be required to prove that they are abiding by the University's rule against drug use. While the University does not request information other than the presence of the proscribed drugs from the laboratory, urine can reveal a whole host of other personal information such as use of birth control pills.

Student athletes are randomly chosen to take the "rapid eye exam" (REE). As administered by the University the REE consists of four tests. First, a trainer measures pupil size with a card called a "pupilometer". Second, the trainer tests for the pupil's reaction to light. Third, the trainer observes whether nystagmus (involuntary jerking of the eye) is present. Finally, the trainer measures "convergence" i.e. the ability of the subject to maintain a properly aligned fixed stare at an object which is brought from approximately 18 inches away to one inch from the subject's nose. The failure to "pass" any two of the "tests" will result in a mandatory urine test. However, the students are uncomfortable when taking the test and continue to feel as though they are required to prove their innocence. If a person fails the REE, the person is subjected to a heightened level of suspicion by others.

Since the REE was administered in 1986 approximately 3000 to 4000 REE's have been administered to students. Mr. Burton, the University's head trainer testified that 10% to 15% of those who take the REE's "fail" and are required to provide a urine

sample. He further testified that nine urine tests have been positive since 1986. Of the 300 to 600 urine tests given, therefore, only 3% to 1.5% of those tests have revealed any drug use by the University's student athletes. The rapid eye exam as given by the University has virtually no ability to measure drug use. Simply put, it is incorrect 97% to 98.5% of the time. Such a result is not surprising. The expert testimony before the court indicated that many factors could cause the student to "fail" any one or more of the tests. Indeed some of the responses, like nystagmus, are normal among the population. Not only are there other reasons for "failure" on the test, it is clearly subject to the ability of the trainer and misinterpretation of the results by a particular trainer. The REE does not function, in any sense, as "reasonable suspicion" of drug use. Because of its disastrous ability to predict drug use, it functions more as an avenue to inject arbitrary judgments into an otherwise random selection of students for testing. While students are randomly selected by computer numbers to take the REE, the unreviewable decision to fail a student, and therefore to require a urine test, is in the subjective discretion of the particular trainer involved.

While the University labels the program as a "Drug Education Program", there is little education. The University places posters in the training rooms urging students not to use drugs. Once a year or so the University provides a presentation of some sort concerning either the dangers of drugs or the method of testing to be used during that year. There is no ongoing educational component of the program. Testing is clearly its major focus.

Several of the defendant University's experts testified that the "reasonable suspicion" criteria utilized by the University are ineffective in determining drug use. It is clear from the evidence that drug use cannot be determined by absence from practice, physical appearance, or other criteria listed in the policy. There were "6 or 7" urine tests required by the University over the past two years based upon the "reasonable suspicion" criteria. Of those one was reported as positive.

## II. CONCLUSIONS OF LAW

### A. THE UNITED STATES CONSTITUTION.

The Fourth Amendment to the United States Constitution provides that

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The court must determine whether the various components of the University's drug-testing program meet the requirements of the Fourth Amendment.

1. Random Urine Test Without Individualized Suspicion

The University has conducted visually observed random collection of urine samples and now conducts aurally monitored collection of samples of those who fail the Rapid Eye Exam. There is no case known to the court which has held that a governmentally compelled urine sample is not a search pursuant to the Fourth Amendment. As the Supreme Court ruled in *Skinner v. Railway Labor Executives*, 109 S.Ct. 1402, 1413 (1989):

> There are few activities in our society more personal or private than the passing of urine... It is a function traditionally performed without public observation; indeed its performance in public is generally prohibited by law as well as social custom. (quoting the opinion in *National Treasury Employees Union v. Van Raab*, 816 F.2d 170, 175 (5th Cir. 1987).

The determination that a governmentally compelled urine sample is a search for Fourth Amendment purposes, however, merely begins the inquiry. The Supreme Court has determined

that the issue becomes whether the search and seizure is reasonable depending upon all the circumstances, and that the "permissibility of a particular practice" is judged by balancing the intrusion of the individual against the promotion of legitimate governmental interests. Skinner, 109 S.Ct. at 1414.

In *Skinner* the Supreme Court decided that breath and urine tests of railroad employees involved in certain accidents and violation of safety rules were reasonable given though there was no warrant, no probable cause and no reasonable suspicion that any particular employee was impaired. The Court's ruling rests on a history of drug and alcohol use in the railroad industry and deaths caused by alcohol and drug use. The Court determined that in order to ensure the safety of the traveling public such tests did not need to conform to the warrant and probable cause requirement. The Court characterized the need to protect the public as "compelling" in this already heavily regulated industry. On balance the Court found that the privacy interests of employees, though substantial, were outweighed by the compelling special need to avoid further deaths and injury.

Similarly in *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384, 1395 (1989), the Court held that the "extraordinary safety and national security hazards that would attend the promotion of drug users to positions that required the carrying of firearms or the interdiction of controlled substances" permitted the one-time urine testing of customs officials who were seeking such promotions. The Court cited the potential for bribery in holding that it was apparent that the government had "a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment."

It is against this background that the University's random, suspicionless search of student athletes must be judged. The intrusion is clearly significant. The interests suggested by the University are compliance with NCAA required tests, a concern for the students' health and safety, and a need to promote fair competition. The goals sought to be achieved by the University

are certainly commendable.[1] Student athletes who compete at NCAA events are subject to drug-testing and the University would like to be certain that its athletes will not be disqualified. Drug abuse is a significant problem that has serious health consequences. Athletic competitions should be conducted fairly. However, having acknowledged that the interests asserted are valid, the inquiry becomes whether they rise to the "compelling special needs" necessary to avoid the warrant and probable cause requirements of the Fourth Amendment. We must remember that, after all, it is only athletic games we are concerned with here. There are no issues of "public safety" or "national security". There is no evidence of special substantial drug abuse which distinguishes this population from any other in our society. The integrity of athletic contests cannot be purchased at the cost of the privacy interests protected by the Fourth Amendment. There is simply no compelling interest suggested by the University which rises to the level required by Skinner and Von Raab. If the interest suggested here are sufficient to validate random suspicionless drug testing, there is no segment of the population which could legitimately claim exemption from such tests. If the urine testing program instituted by the University is constitutional, anyone subject to state action — lawyers, doctors, University employees, state office workers — could be subject to random, suspicionless, urine drug-testing. For it is quite clear that government has an even more valid interest in operating efficiently, fairly and competently than a University sports program. A government that invades the privacy of its citizens without compelling reason, no longer abides by the Constitutional provisions essential to a free society. The court holds that because the University requires such testing in the absence of a

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[1] No one can doubt that the University may condition participation in intercollegiate athletics on a number of valid bases e.g. grade point average, compliance with practice requirements, etc.. A rule which prohibits any illegal drug use is also a clearly valid requirement. At issue in this litigation is the method by which evidence of violation of that rule may be obtained. *See, Perry v. Sinderman* [sic], 408 U.S. 583 (1972) and the discussion in Section II(C) *infra.*

compelling interest, random urine testing is a violation of the Fourth Amendment.[2]

2. The Rapid Eye Exam

The Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) determined that the search of a high school student's purse for cigarettes was "reasonable" under the Fourth Amendment where the student had been observed smoking and had denied that she had been smoking. The Supreme Court affirmed its prior holding that high school students do have an expectation of privacy and that they have not waived that expectation by attending school. However, the Court held that neither a warrant nor probable cause was necessary for school officials to search a student's property; rather the legality of such a search depends upon the "reasonableness" under all the circumstances of the search. Such a search is reasonable if it was justified at its inception and is conducted in a manner reasonably related in scope to the circumstances that justified the interference in the first instance.

The University argues that *T.L.O.* provides a legal basis for the REE in the instant case. *T.L.O.* however, is clearly distinguishable from the instant case. First, it involves a case of individualized suspicion. The students in the high school at issue were not subject to random searches. A particular student with particularized suspicion was required to reveal the contents of her purse. The Supreme Court in *T.L.O.* did not sanction the random search represented by the REE. Second, the search involved in *T.L.O.* was a property search, not a search of the person's body. The REE requires the search of bodily movements on command. Those eye movements are not available for inspection by everyone and are more significant than the contents of a purse. Third,

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[2] Since *Skinner* and *Von Raab*, random drug testing has been approved only where the government has demonstrated a compelling interest. *Harness v. Bush*, (D.D.C. 89-0044 89-0950 89-1152 May 19, 1989) (for General Service Administration employees who carry firearms); *Harmon v. Thornburgh*, (D.C.Cir. 88-5265 June 30, 1989) (for Department of Justice employees holding top secret clearance).

the student involved in *T.L.O.* was a high school not a college student. As Justices Powell and O'Connor noted in a concurring opinion, their decision was premised on the "special characteristics of elementary and secondary schools that make it unnecessary to offer students the same constitutional protections granted adults and juveniles in a non-school setting". There is clearly a substantial difference between a 14 year old caught smoking and David Derdeyn an almost 30 year old college student.

The Supreme Court has allowed other exceptions to the warrant and probable cause requirement of the Fourth Amendment e.g. *O'Connor v. Ortega*, 480 U.S. 709 (1987) (work-related searches of employees desks and offices); *New York v. Buger*, 482 U.S. 691 (1987) (search of premises of certain highly regulated businesses); *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) (border searches). The court has also allowed a limited search of a person to be conducted on less than probable cause e.g. *Terry v. Ohio*, 392 U.S.1 (1968). However, all of the deviations from the probable cause and warrant requirement approved by the Court involve either a minimal intrusion, intrusion into an area of lesser expectation of privacy, or are motivated by a very compelling public interest.

The Rapid Eye Exam is a search. It requires the revelation of information that is personal and undisclosed to the public at large. It is not motivated by a compelling public interest and it does not involve a property search. It cannot be conducted by the University on a random basis without any suspicion of wrong doing. Even if the warrant and probable cause standard do not apply to REE's, a "reasonableness" standard dictates that the intrusion without suspicion is unreasonable.

Moreover, and more importantly, the court has determined that as a factual matter the REE is totally ineffective. It is an intrusion without purpose. It does not reveal what is intended to reveal. It is wholly unable to indicate with any measure of validity whether a person has been using any of the proscribed drugs. It is as though the border patrol in *Martinez-Fuerte* searched not the

cars of those who may be smuggling illegal aliens into the country, but their eyes in order to determine whether illegal aliens are being transported. No intrusion, however slight, can be deemed "reasonable" for purposes of the Fourth Amendment where the intrusion will not and cannot reveal the information sought.

The rapid eye exam is an unconstitutional intrusion under the "reasonableness" standard of the Fourth Amendment.

3. Urine Test Based on "Reasonable Suspicion"

The court has found that, based on the testimony of the defendants' witnesses, the "reasonable suspicion" criteria utilized by the University are incapable of indicating drug use. There are many other causes of manifestations listed by the University and many persons using drugs exhibit none of the criteria. Based upon that evidence the court is precluded from determining that the "reasonable suspicion" criteria is set forth by the University can be a basis for requiring a urine test. Like the REE, the reasonable suspicion criteria are incapable of indicating drug use to any degree. That failure makes "unreasonable" any search conducted pursuant to those criteria.

Beyond the factual conclusion that the reasonable suspicion criteria are ineffective, as a matter of law the court determines that the appropriate standard is probable cause. While the Supreme Court has determined that there are exceptions to the probable cause standards, (see discussion part (I)(A)(1) and (2) infra,) none of those exceptions apply in the instant case. *T.L.O.* involved a very limited property search of a high school student. This case concerns a very intrusive body fluid search of college students. Drug-testing premised upon the criteria listed by the University does not enhance the interests asserted in regard to random urine testing. There are insufficient compelling reasons for the University to be allowed to deviate from the probable cause standard.

## B. THE COLORADO CONSTITUTION

Article II, section 7 of the Colorado Constitution provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

The purpose of this provision is to protect a person's legitimate expectation of privacy from unreasonable governmental intrusion. *People v. Sporleder*, 666 P.2d 135 (Colo. 1983). Although Colorado's provision is similar to the Fourth Amendment to the United States Constitution, Colorado is not bound by federal interpretation of the Fourth Amendment in determining the scope of Article II, section 7. In a substantial number of cases, the Colorado Supreme Court has determined that Colorado protects privacy interests left unprotected by the federal constitution.

In *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980), the Colorado Supreme Court held that an individual's bank records were protected from disclosure, rejecting the United States Supreme Court holding in *United States v. Miller*, 425 U.S. 435 (1976), that there was no reasonable expectation of privacy in such records. Again in *People v. Sporleder*, the Colorado Supreme Court held that there is an expectation of privacy in the telephone numbers which are dialed by an individual and that probable cause and a warrant is required to obtain that "pen register" information. There are several other examples of the greater protection afforded by Article II, section 7: *People v. Santistevan*, 715 P.2d 792 (Colo. 1986), *cert. denied*, 479 U.S. 965 (1986) (Visual examination of suspect's hands under a special light is a search for Colorado Constitution purposes); *People v. Oates*, 698 P.2d 811 (Colo. 1985) (electronic beeper a search under Colorado Constitution); *People v. Carr*, 682 P.2d 20 (Colo.

1984) *cert. denied*, 469 U.S. 855 (1984) (telephone records a search).

It is with this background that the court must evaluate the components of the University's drug-testing program under the Colorado Constitution.

1. Urine Tests

Because of the nature of the intrusions which the Colorado Supreme Court has protected under Article II, section 7, there can be little doubt that a suspicionless random urine test should be considered a search for purposes of analysis under the Colorado Constitution. Again, the court is unaware of any court in any jurisdiction holding to the contrary. Certainly obtaining an individual's body fluid is more invasive than revealing the telephone numbers dialed as in *Sporleder*. Governmentally mandated urine testing therefore is a search pursuant to Article II, section 7.

Unlike the United States Supreme Court, the Colorado Supreme Court has been reluctant to carve out exceptions to the probable cause and warrant requirement. Colorado has allowed a limited intrusion based upon articulable suspicion similar to that articulated in *Terry v. Ohio*. *People v. Lewis*, 659 P.2d 676 (Colo. 1983); *People v. Stone*, 174 Colo. 504, 485 P.2d 495 (1971). The doctrine of exigent circumstances may also justify a warrantless search under the Colorado Constitution e.g., *People v. Hogan*, 649 P.2d 326 (1982) (and cases cited therein).

However, Colorado has not found other exceptions to the warrant and probable cause requirements in Article II, section 7. Because of the substantial intrusion represented by the suspicionless random urine tests, it is clear that they violate an individual's reasonable expectation of privacy. There being no exception in Colorado law for "compelling interests" or "special needs", those urine tests are an unconstitutional intrusion pursuant to Article II, section 7.

Urine tests based upon the "reasonable suspicion" criteria utilized by the University are no more sustainable than suspicionless tests because as noted above, they are ineffective in creating any real suspicion of drug use. However, even if such criteria could be developed or even if the criteria utilized are perceived as effective, the Colorado Constitution does not sanction such an intrusion. The Court in *Sporleder*, the pen register case, considered whether a standard short of probable cause could suffice to authorize that governmental intrusion. The Court rejected the notion:

> Article II, Section 7 of the Colorado Constitution interposes itself between the people and the government by generally requiring the procurance of a search warrant based on probable cause before the government can intrude into one's legitimate privacy interests. While admittedly some forms of governmental intrusion are so narrow in scope and purpose and justified by such substantial law enforcement interests that they may be made on less than probable cause, we are not dealing with such a limited intrusion in this case. Because a telephone subscriber has a legitimate expectation of privacy in the telephone numbers dialed, the installation of a pen register and the acquisition of information about the telephone numbers dialed by the subscriber is nothing less than a full-scale search and seizure in the constitutional sense of those terms. The pen register "looks for" or "searches out" that which is otherwise concealed from governmental viewing. Similarly, the creation and subsequent acquisition of the record of the telephone calls made is a "taking" or "seizing" of that information.
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> * * *
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> Were we to permit an exception to the warrant requirement that would encompass the type of pervasive intrusion that occurred here, we would indeed permit the exception to become the norm, in derogation of the purpose of the warrant requirement itself.

*People v. Sporleder*, 666 P.2d at 143-44. (citations omitted).

If the telephone numbers that are dialed by an individual must be protected by the warrant and probable cause requirements, no logical argument can be made that compelled monitored production of a person's body fluid is not similarly protected. The invasion of privacy required by the University's urine test is clearly more substantial than the revelation that an individual called a particular phone number at a particular time and day. The failure of the University's urine tests to require probable cause support, makes those tests unconstitutional under the Colorado Constitution. Again the court has found that the "reasonable suspicion" criteria fail in any sense to actually reveal drug use. Therefore, whether the urine tests are random and suspicionless or are predicated on the reasonable suspicion requirement as stated in the University's policy, they are unconstitutional under Article II, section 7 of the Colorado Constitution.

2. Rapid Eye Exam

The University's Rapid Eye Exam is not as intrusive as the requirement for urine testing. As noted above, the Colorado Constitution does allow limited intrusions on less than probable cause. *Stone, supra*. The University REE is however not supported by any suspicion but is instead performed on a random suspicionless basis. As noted above, the Colorado Supreme Court has held that the examination of hands (*Santistevan*), bank records (*DiGiacomo*) and telephone numbers (*Sporleder*) are "searches" requiring probable cause for purposes of Article II, section 7. In *People v. Carlson*, 677 P.2d 310 (Colo. 1984), the Court considered whether various physical movements of a person suspected of driving under the influence constituted a search for constitutional purposes. The court first noted that "a search consists of looking for or seeking out that which is otherwise concealed from view" 677 P.2d at 316. Based upon that standard, the Court held that the police officer's observation of a suspect as he walked back to talk to the office outside of the lane of traffic was not a search. It was just the observation of physical

characteristics which are in plain view to all. The Court then considered whether "roadside maneuvers" constituted a search. Those maneuvers consist of four tests which are designed to measure potential intoxication: standing straight with eyes closed and head back, recitation of the alphabet, walking a straight line and touching finger to nose. The Court noted that because these tests involve an examination and evaluation of a persons's ability to perform a series of coordinated physical maneuvers not normally performed in public, there was a constitutionally protected privacy interest in the characteristics revealed. The Court held that roadside sobriety testing constituted a "full search" which must be supported by probable cause. Again the Court emphasized that "were this type of intrusive search to be permitted on less that probable cause, the "exception" created by *Terry* and its progeny would swallow the general rule that searches and seizures are reasonable only if based on probable cause." 677 P.2d at 317.

The rapid eye exam as administered by the University is an "examination" of a "person's ability to perform a series of physical maneuvers" to determine drug usage. The examination is of characteristics not normally performed in public. There is therefore a constitutionally protected privacy interest in the matters revealed by the tests. Under *Carlson*, the REE is a full search which requires probable cause support. Even assuming that the REE is somehow to be considered less intrusive than roadside maneuvers, the fact that they are required without any suspicions whatsoever is a violation of Article II, section 7 under Colorado law. Moreover, as noted above, the REE is incapable of indicating drug use. That fact precludes any finding that its compelled use could be constitutional under any standard.

## C. CONSENT

The University argues that under both the Federal and Colorado Constitutions, the University's drug testing program is valid because the student athletes consent to all of its components prior to any testing. It is undisputed that students are required to

consent to all the components of the University's drug testing program as a condition to participation and as a condition of obtaining scholarship funds. Any athlete who refuses to consent will not be allowed to participate and will not obtain previously committed scholarship aid.

A person may give a voluntary consent to a search otherwise precluded by the requirements of the Fourth Amendment to the United States Constitution and Article II, section 7 of the Colorado Constitution.

It is the duty of the government to "demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. Voluntariness in a question of fact to be determined from all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

The fact that participation in intercollegiate sports is not a "right" but a "benefit" does not alter the requirement that any consent be voluntary. The Supreme Court has acknowledged that

> Though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest . . . . For if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible. *Perry v. Sinderman* [sic], 408 U.S. 583, 597 (1972).

It is quite clear that no consent can be voluntary where the failure to consent results in a denial of the governmental benefit. *Bostic v. McClendon*, 650 F.Supp. 245 (N.D. Ga. 1986) ("Consent" by city clerk's office and police personnel to urinalysis

testing was not voluntary where employment would have been terminated if personnel refused to participate); *Feliciano v. City of Cleveland*, 661 F.Supp. 578 (N.D. Ohio 1987) (Police academy cadets did not voluntarily consent to urinalysis for drug testing where cadets believed that producing urine samples was necessary to retain their jobs); *American Federation of Gov. Employees v. Weinberger*, 651 F.Supp. 726 (S.D. Ga. 1986) (Because signed consent to Department of Defense mandatory urinalysis drug testing was given only because jobs would be lost if consent forms were not signed, the "consent" obtained was not voluntary); *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) ("Consent" by high school student-athletes to drug testing was not effective as consent because participation in urinalysis testing was required for participation in interscholastic athletics).

The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary. It is quite clear that they are "coerced" for constitutional purposes by the fact that there can be no participation in athletics without a signed consent. As in the cases cited, the "consent" obtained by the University is not voluntary and does not exempt the University from the constitutional requirements of the United States and Colorado Constitutions.

## III. CONCLUSION, ORDER AND JUDGMENT

The rights protected by the Fourth Amendment and Article II, section 7 are essential to a free society. Drug abuse is a very significant problem which can and does devastate the lives of many members of this society. While there is no evidence of drug abuse in the University of Colorado athletic program, the drug testing program developed by the University is, at least in part, a sincere attempt to prevent the devastation of drug abuse among student athletes.

It is essential, however, that even sincere, legitimate concerns not be allowed to dull the vigilant defense of the values protected by the Constitution.

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. *Skinner*, 109 S.Ct. at 1402, (Scalia, J. dissenting, quoting Justice Brandeis, *Olmstead v. United States*, 277 U.S. 438, 479 (1928)).

The Court declares that the University's drug testing program which requires urine tests and rapid eye exam is unconstitutional under both the Fourth Amendment to the United States Constitution and Article II, section 7 of the Colorado Constitution. The Court permanently enjoins the University from requiring any urine samples from student athletes for the purposes of drug testing, whether those tests occur on a random basis or as a result of the "reasonable suspicion" criteria stated. The University is further enjoined from requiring student athletes participation in the Rapid Eye Exam procedure.

BY THE COURT:

/s/ JUDGE JOSEPH BELLIPANI

## APPENDIX D

SUPREME COURT, STATE OF COLORADO

Case No. 92 SC 86

CERTIORARI TO THE COLORADO COURT OF APPEALS
CASE NO. 89 CA 2044

BOULDER COUNTY DISTRICT COURT 86CV2245

ORDER OF COURT

UNIVERSITY OF COLORADO, Boulder, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; GORDON GEE, as President of the University of Colorado, Boulder; and WILLIAM MAROLT as Athletic Director, Department of Intercollegiate Athletics,

*Petitioners,*

*v.*

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Respondents.*

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 6, 1993.

Chief Justice Rovira and Justice Erickson would grant the Petition.

APR 11 1994
OFFICE OF THE CLERK

No. 93-1410

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

UNIVERSITY OF COLORADO, BOULDER, through its Board, THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate; JUDITH ALBINO, as President of the University of Colorado, Boulder; and WILLIAM MAROLT, as Athletic Director, Department of Intercollegiate Athletics,

*Petitioners*,

*v.*

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether, based on the extensive trial record, the Colorado Supreme Court properly applied the clearly established principles of *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), when it held that the University's drug testing programs, which included random, suspicionless urine testing of student athletes, student trainers, managers and cheerleaders, violated the Fourth Amendment prohibition against unreasonable searches and seizures.

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II. ON THE SPECIFIC FACTS DEVELOPED AT TRIAL, ALL FOUR VERSIONS OF THE UNIVERSITY'S PROGRAMS COMPELLING RANDOM, SUSPICIONLESS URINE TESTING OF STUDENT ATHLETES, STUDENT TRAINERS, MANAGERS AND CHEERLEADERS CONSTITUTE

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents David Derdeyn, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Colorado Supreme Court's decision in this case.

## STATEMENT OF THE CASE

In this class action, participants in the University of Colorado's intercollegiate athletic program challenged four of the University's drug testing programs on federal and state constitutional grounds. After a week-long trial, the district court enjoined enforcement of the programs, declaring that searches and seizures thereunder violated both the Fourth Amendment of the United States Constitution and Article II, § 7, of the Colorado Constitution.

The University now asks this Court to review the general question of whether random, suspicionless drug testing of student athletes violates the Fourth Amendment. That general question, however, is not presented here. Instead, the Respondents challenged, and the Colorado courts struck down on both federal and state constitutional grounds, four specific University programs that required random, suspicionless drug testing, initially of student athletes, and later of student athletes, student trainers, managers and cheerleaders.

In striking down these programs, the Colorado courts relied on an extensive factual record and faithfully applied this Court's reasoning in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

There is no dispute about the legal principles that govern in this case. Rather, the University's objection is to the manner in which the Colorado courts applied those principles to the specific factual record compiled below. That factual dispute does not warrant this Court's plenary review. Any other conclusion would place this Court in the untenable position of reviewing every drug testing

decision issued around the country.

**The University of Colorado's Drug Testing Programs.**

**The four different programs.**

From 1984 to 1989, the University enforced four separate drug testing programs. Each shared some common elements. For example, all of the programs called for urine testing at the students' annual pre-season physical examination. (Exs. 5-8). Thereafter, the University compelled the students to submit to some form of random testing. Tests were designed to be truly random, so the same student could be, and in many cases was, called back numerous times during the season. (*See, e.g.*, Tr. 23-24, 70). To participate in the athletic program and qualify for accompanying financial assistance, all students had to sign a University form purporting to give "consent" to testing. (Exs. 5-8). In none of the programs did the University give general assurances of confidentiality. Pet. App. A at 4a-6a. Positive test results were announced to at least the Team Physician, the athlete, student trainer, manager, or cheerleader who was tested, the Athletic Director, the Head Trainer, and the student's coach, parents, and guardians.[1] (Ex. 5-8).

Under the first program the University randomly, and "regularly," drug tested approximately 10-15% of the covered students every week. (Ex. 5) (Tr. 211). Testing was not visually monitored. A first positive test resulted in counseling; a second, in one week's suspension; and a third, in a year's suspension and loss of athletic financial assistance. (Ex. 5). Positive test results might also be announced not only to those already described, but also to the student's spouse. (Ex. 5).

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[1] The University's programs also authorized testing students upon "reasonable suspicion" of drug usage, but those provisions are not in issue here. In any event, at trial the University's expert witness claimed that only random, suspicionless drug testing would meet the government's interests. (Tr. 779-785).

The second program implemented four basic changes. Students had to "disrobe" while providing the urine sample. Pet. App. A at 4a. Student trainers and athletic staff began directly observing the giving of urine samples. *Id.* (Tr. 228-229, 233) (Ex. 6). Penalties were stiffened so that a first positive test resulted in suspension for the balance of the competitive season, while a second positive meant permanent suspension and loss of all athletic financial aid. (Ex. 6). Finally, the laboratory drug detection standards were changed, helping to eliminate false positive test results. (*See* Tr. 218-220, 229-231, 324-325).

The third program again enhanced the penalty for a first positive test. Such a test would result in an immediate one-year suspension from athletics. Pet. App. A at 5a.

The final program, in effect from August, 1988 to the time of trial, differed significantly. It included the use of random, suspicionless rapid eye examinations (REE).[2] Students who failed any two parts of the REE were required to give a urine sample, which if positive led to a one-year suspension. A second positive urine test meant permanent suspension and loss of all athletic financial aid. (Ex. 8). "Work supervisors" were added to the list of individuals who might be notified of a student's positive test result. (*Id.*). Student trainers, managers and cheerleaders were specifically added to the definition of "athletes" subject to urine testing. (*Id.*).

The University performed thousands of REEs (Tr. 247), which the district court found to be completely untrustworthy. Pet. App. C at 95a. The evidence showed that an REE had "virtually no

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[2] This "test" had the trainer look into the student's eyes, measure pupil size with a cardboard "pupilometer," shine a penlight to observe pupil dilation; observe whether nystagmus (involuntary jerking of the eye) was occurring, and evaluate "convergence" (the ability to focus on an object as it was brought to within one inch of the student's face). Pet. App. C at 88a (Ex.14) (Tr. 39-41).

ability to measure drug use," since it was wrong 97% to 98.5% of the time. *Id.* at 88a-89a. Urine tests premised on REE results, as a practical matter, therefore, were random, and suspicionless. The district court held that REEs were unreasonable searches under the Fourth Amendment and the Colorado Constitution, *id.* at 100a, a decision the University did not appeal.[3]

**Effect on student privacy interests.**

The central part of each program was the random, suspicionless urine testing of students conducted by staff and student trainers. *See* Pet. App. C at 89a. Aside from the annual physical, tests were performed not by medical professionals, but by members of the athletic staff, including student trainers, who at times were assigned to visually monitor athletes, other student trainers, managers and cheerleaders submit their urine samples. During urine collection, "you have direct exposed genitals to the trainer and the trainer is looking at it." (Tr. 52; *see also* Tr. 26-27, 78, 125, 208, 233). The samples were collected in athletic training rooms and in bathrooms behind coaching offices. (Tr. 12, 71, 126) (*See* Ex. 8 at 7, requiring urine samples to be collected in "athletic" facilities). As one uncontradicted student testified, "The restroom was filthy in the training room. The one in Wardenburg [Student Health Center, where annual physical examinations might be done] was okay but the restroom in the training room was always filthy and you had to do it in front of somebody else and you had to do it in one day." (Tr. 71).

Student and staff trainers did, of course, provide sports-related care to the athletes. (*See, e.g.*, Tr. 37-38). That attention and care, however, was fundamentally different from the kind of attention paid to an athlete during the drug testing process. (*See, e.g.*, Tr.

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[3] The University asked the Colorado Supreme Court to evaluate its programs as if they did not use the REE. The court declined because the REE "was an integral part of the program," and the University "reserved a right to return to any of the drug-testing procedures that it used in its earlier programs." Pet. App. A at 13a n.15.

at 78: "Some female trainer had to be in the restroom watching you, in the actual stall watching you while you went to the bathroom."). The University's requirements that staff and student trainers monitor the students during urine testing perverted student-trainer relationships and made training staff seem hostile, not helpful to the athletes. Pet. App. A at 22a-23a n.21; *(see also, e.g.*, Tr. 84-86; *contrast with* Pet. at 3-4). There was ample evidence that the procedures offended the basic dignity, and the legitimate expectations of privacy, of the students tested.[4] At no time did the University submit evidence to show that student trainers, managers or cheerleaders in any way had lessened privacy expectations.

**Mandated consents to drug testing.**

Each student was required to sign a "consent" to testing or forego participation in the athletic program. (Exs. 5-8). Refusal to consent meant not only exclusion from the program, but also loss of accompanying financial aid on which students relied. (Ex. 5-8). Details of the consent forms and the specific testing

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[4] *See, e.g.*, Pet. App. A at 22a-23a nn.21-22:

> When I was treated by the athletic trainers, of course, they at various times touched various part (*sic*) of my body, that is necessary for treatment. At no time was I required to disrobe for this treatment or required to bear (*sic*) my genitals. Now, in the question of being observed giving a urine sample, you have direct, exposed genitals to the trainer and the trainer is looking at it and it's considered a private part of my body in my estimation.
>
> . . .
>
> When the trainers were treating me it was more like I was getting medical treatment and they were, say, some sort of medical personnel who were there to help me. In the instance of the drug testing, it was more like they were a policeman, more like an enforcement type situation and the atmosphere changed from friendly to adversarial.

(Tr. 52-53).

programs surprised students as they reported to the Athletic Department. (*See, e.g.*, Tr. 65). University witnesses testified that student athletes who were "recruited" were given advance notice of the drug testing programs. (*See, e.g.*, Tr. 183-184). The University, however, presented no evidence as to how many of the almost 450 students covered by the program in 1989 were recruited. (*See* Ex. 42).

Students, including those who were not recruited, learned about the program at their first team meeting, or in general discussions with coaches where the details were not specified. (Tr. 65-67, 119, 121-122). The University did not show that its procedures resulted in sufficient program information getting to transfer students, walk-ons, student trainers, managers or cheerleaders in advance of their first team meeting. (*See, e.g.*, Tr. 122-124). By that time students had already committed to attend the University and, as a practical matter, were precluded from going elsewhere. (*See, e.g.*, Tr. at 69). Based on these facts the Colorado Supreme Court affirmed the district court's finding that the University had not proven that consent to drug testing was voluntarily given. Pet. App. A at 40a-41a.

**The University's drug testing programs within the context of intercollegiate sports.**

The University inaccurately asserts that the privacy interests of the affected students are significantly lessened because of their involvement in private organizations like the NCAA, and the regulation of their personal habits within the intercollegiate sports program. (Pet. at 2-3). With respect to student athletes, the NCAA requires only participants in post-season competition to submit to random urine testing which the NCAA, not the University, conducts. (Tr. 50-51; Exs. 10 at 2, 13 at 5, 17 at 333-

335).[5] Furthermore, the University presented no evidence concerning the likelihood that any particular athlete would undergo NCAA testing.

The record does not show that athletes received "frequent" medical examinations. (*Compare* Tr. 49, 89, *with* Pet. at 3). Aside from one annual physical examination at the student health office, some athletes never saw a doctor, and rarely if ever used training services -- except when they were being drug tested. (*See* Tr. at 71). Many athletes did receive athletic training services, but these services were qualitatively different from students' experience during drug testing. (Tr. 78, 84-86).

Performing athletes in some instances might face curfews, study halls and training tables. (Pet. at 3). In practice, this happens only in two sports -- football and men's basketball. (Tr. 193-194). The record does not show that such restrictions affect the majority of student athletes, or any student trainers, managers or cheerleaders.

Finally, student trainers, managers and cheerleaders are not subject to NCAA drug testing. Nonetheless, the University classified those individuals as "athletes" for drug testing purposes. Pet. App. A at 24a nn.23-24; (Ex. 8 at 1). Nothing in the record shows that these students are ever required to take physical examinations or are subject to other personal regulation. Pet. App. A at 24a n.23.

**The Decisions of the Colorado Courts.**

**The trial court.**

The trial court made extensive factual findings and carefully analyzed those findings under *Skinner* and *Von Raab*. The court

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[5] Nothing in the record shows, and the University does not argue, that the Colorado Supreme Court's decision in any way interferes with the University's continued membership or participation in the NCAA or any other sports association.

commended the University for seeking to stop drug use and recognized many of the University's asserted interests. Yet, on balance the court held the University's random, suspicionless drug tests were unreasonable searches and seizures under the Fourth Amendment and Article II, § 7, of the Colorado Constitution. Pet. App. C at 90a-93a.

The University argued that even if its programs included otherwise unconstitutional searches and seizures, the programs were nevertheless permissible because the students had signed "consents" to be tested. *Id.* at 100a. The court acknowledged that "[a] person may give a voluntary consent to a search otherwise precluded by the requirements of the . . . Constitution." *Id.* at 101a. The court then considered the evidence to decide first, whether the consents were factually voluntary under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and second, whether the consents were enforceable under the unconstitutional conditions doctrine of *Perry v. Sindermann*, 408 U.S. 593 (1972). *Id.* at 101a-102a.

The court concluded: "The evidence produced during this trial failed to establish that the consents given by the University's student-athletes are voluntary." *Id.* at 102a. That holding answered the factual question posed by *Schneckloth*. The court additionally reached the *Perry* question: "It is quite clear that they are 'coerced' for constitutional purposes by the fact that there can be no participation in athletics without a signed consent." *Id.*

**The Colorado Court of Appeals.**

The Colorado Court of Appeals generally affirmed, again applying the balancing test of *Skinner* and *Von Raab* and concluding the searches were unreasonable under the federal and state constitution. Pet. App. B. The court did not reach the question of whether the programs created an unconstitutional condition. Rather, it affirmed on evidentiary grounds. *Id.* at 82a.

**The Colorado Supreme Court.**

The Colorado Supreme Court also applied the balancing test of *Skinner* and *Von Raab* to the facts, and affirmed the lower courts' conclusion that the programs violated both the Fourth Amendment and Article II, § 7, of the Colorado Constitution. It thoroughly considered the same fact-based arguments the University restates here. Pet. App. A at 15a-34a. The court closely examined the degree to which the University's programs intrude on students' privacy, *Id.* at 16a-28a, evaluated the significance of the University's interests in enforcing the programs, comparing those interests to those in more than a dozen cases in the area, *id.* at 29a-33a, and held that "the great majority of cases following *Skinner* and *Von Raab* clearly militate against the conclusion that CU's [the University of Colorado's] program is a reasonable exercise of state power under the Fourth Amendment." *Id.* at 33a (footnote omitted).

Turning to the University's consent defense, the court held that *Schneckloth* was the controlling precedent. *Id.* at 34a-35a. The court held that testimony from Respondents' witnesses, and the lack of evidence offered by the University, supported the trial court finding that -- regardless of what the University said its policy was -- it did not meet its burden of proof. *Id.* at 35a-36a & n.31. The University failed to show that: (1) adequate advance notice of testing was given; (2) students were offered sufficient time to apply to other colleges if they objected to the University's program; (3) students were adequately advised that former drug testing procedures could be used. *Id.* at 40a-41a.

These evidentiary failures were separate from the fact that students were also coerced into signing consent forms since they could neither participate nor receive needed financial aid unless they agreed to the testing. *Id.* Having concluded that the consents secured under the University's programs were not voluntary, the court found that it would be both unnecessary and improper to reach the unconstitutional conditions question. *Id.* at 41a n.36.

## REASONS FOR DENYING THE WRIT

### I.

### THE COLORADO SUPREME COURT PROPERLY DECIDED THIS CASE, APPLYING THE NOW WELL-ESTABLISHED GOVERNING FOURTH AMENDMENT PRINCIPLES FROM THIS COURT'S PRECEDENTS TO THE EXTENSIVE FACTUAL RECORD CONCERNING THE UNIVERSITY'S RANDOM, SUSPICIONLESS DRUG TESTING PROGRAMS.

The Colorado Supreme Court meticulously applied the reasonableness balancing test this Court established in *Skinner* and *Von Raab*. The Colorado Supreme Court's conclusion that, on this record, the University's drug testing program violates the Fourth Amendment is consistent with a wide range of post-*Skinner* and *Von Raab* decisions. These decisions have applied *Skinner* and *Von Raab* to specific fact situations, in some instances approving random drug testing, while striking it down in others. Results have differed from agency to agency, and from one class of employee to another, depending on the facts, even when programs might appear similar on their face. *See, e.g., National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (Army air traffic control employees may be randomly drug tested, while laboratory workers may not); *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) (Department of Justice employees with top secret security clearances subject to random urinalysis, but government interest in public safety and the integrity of work force does not justify testing all classified document clerks and prosecutors); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (random testing for correctional officers in contact with prisoners allowed, but not allowed for all jail staff); *American Fed'n of Gov't Employees, Local 1616 v. Thornburgh*, 798 F. Supp. 597 (N.D. Cal. 1991) (Immigration and Naturalization Service may randomly drug test employees with access to security sensitive material but not all

workers); *National Treasury Employees Union v. Watkins*, 722 F. Supp. 766 (D.D.C. 1989) (Department of Energy employees in "sensitive" positions may be randomly tested, but not those who drive motor vehicles and operate computers).[6]

In *Skinner* and *Von Raab* this Court held that government-compelled collection and chemical analysis of urine samples are searches governed by the Fourth Amendment because they intrude upon reasonable expectations of privacy. *Skinner*, 489 U.S. at 617. Warrants and probable cause are presumptively necessary to justify most government searches, but may not always be constitutionally required where "special needs" beyond the normal need for law enforcement are served. *Id.* at 619-21. Moreover, the ordinary requirement for some quantum of individualized suspicion may be excused in "*limited circumstances*, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Id.* at 624 (emphasis added). The reasonableness of a government search in special needs cases is measured by balancing the extent of the privacy interests adversely affected by the search against the corresponding government interests. *Von Raab*, 489 U.S. at 668.

There is no dispute in this case concerning these well established

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[6] These cases illustrate that it is inappropriate under *Skinner* and *Von Raab* to decide the constitutionality of the University's urine testing programs for athletes, student trainers, managers and cheerleaders as if the government's interests with respect to each of those classes is uniform. Notably, the University placed into the record virtually nothing supporting a government interest in randomly testing student trainers, managers or cheerleaders. Aside from once acknowledging that these different classes of students were subject to testing (Pet. at 2), the University never discusses these students' privacy interests or the constitutionality of the University's programs, as applied to them. *See* Pet. App. A at 24a nn.23-24.

legal guidelines. Even the dissenting justices below recognized that this case involves "settled principles of constitutional adjudication." Pet. App. A at 59a (Erickson, J., dissenting).

The University attempts to create a conflict where none exists. Its portrayal of the Colorado Supreme Court's decision as aberrational simply does not comport with the reality of post-*Skinner* and *Von Raab* decisions. What predictably has occurred in the last five years is the inevitably fact-based application of the relevant legal standards by lower courts to particular programs. *See, supra, at 10-11.* That there are different results arising from the application of those standards to the various forms of urine testing programs should surprise no one. That is the natural consequence of this Court's creation of a standard subject to application in a broad variety of factual circumstances.

It is apparent that the University seeks this Court's review not because of any dispute over the guiding legal principles, but merely because it is unhappy with the Colorado Supreme Court's *application* of those well-established standards. This Court's defining opinions in *Skinner* and *Von Raab* clearly anticipated that future applications of this reasonableness balancing test under the Fourth Amendment were likely to be narrowly fact-based. *Skinner*, 489 U.S. at 619 ("what is reasonable . . . 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself'"); *Von Raab*, 489 U.S. at 678 (remanding for specific factual determination on whether classification of employees with access to "sensitive information" was accurately determined).

Furthermore, the factual complications of this case prevent it from being a vehicle for the articulation of useful general principles to guide the lower courts. During the course of this litigation, the University's urine testing program took on four

different formats. Each was in issue at trial.[7]

Some of the modifications undertaken when the University altered its programs have a direct bearing on the reasonableness determination derived from *Skinner* and *Von Raab*. For example, under the second program, students were required to produce their urine samples under the direct visual observation of student trainers and athletic staff. (Tr. 233). The Colorado courts relied, in part, on the extensive testimony about the humiliating intrusion occasioned by this procedure. Pet. App. A at 4a-5a & n.8. In contrast, the fourth program permitted students to provide their specimens in a "private and enclosed area" with aural, rather than visual, monitoring. *Id.* at 6a; *but see Skinner*, 489 U.S. at 617 (collection of urine samples involving visual or aural monitoring of urination implicates privacy interests protected by Fourth Amendment). The Colorado Supreme Court carefully sifted through many pertinent details such as these in concluding that the University's programs are unconstitutional.

Even if this Court were to grant review, it is unlikely that additional guidance could be provided beyond the detailed analytical framework already laid out in *Skinner* and *Von Raab*. The reasonableness determination under the special needs exception to the warrant and probable cause requirements under the Fourth Amendment would necessarily, and properly, remain fact-bound.

It is not consistent with this Court's practice to classify cases, as the University attempts (Pet. 11-12), as "athlete" cases or "public employee" cases. *Skinner* and *Von Raab* make it clear that such broad generalizations are neither useful nor appropriate. Those decisions leave ample room for results in urine testing cases

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[7] The University refused to agree not to return to any of the previous versions, including the one authorizing visual monitoring of urine collection. Pet. App. A at 7a-8a. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (voluntary cessation of illegal conduct does not render a case moot).

tailored to the particular details of a search conducted to serve specific government interests. Context is critical.

Even accepting the University's narrow characterization of this case, the Colorado Supreme Court's decision is not in conflict with authority from other courts. There is only one reported decision specifically addressing the federal constitutionality of a drug testing program in the intercollegiate athletic context. *See O'Halloran v. University of Wash.*, 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988). As the Colorado Supreme Court recognized, the district court opinion in *O'Halloran* is of extremely limited usefulness because it was rendered in the absence of subject matter jurisdiction, was decided prior to *Skinner* and *Von Raab*, and relies primarily on the absence of state action to resolve the constitutional issue. Pet. App. A at 29a-30a & n.29.

Other cases on which the University relies to manufacture a conflict concerned athletic testing in the vastly different context of professional horse racing, where there were more demonstrable safety interests and where legalized gambling heightened integrity concerns related to the public fisc. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc) (danger to self and others and state fiscal interests); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986) (integrity interests in professional sport). *Compare* Pet. App. A at 29a n.28 (observing that the University has not asserted any financial interest to justify the reasonableness of its urine testing programs).

Moreover, two of the other cases address the constitutionality of testing minors in middle or high school, where the state's interests may be magnified due to the youth of the persons subject to testing. *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (pre-*Skinner* and *Von Raab*); *Acton v. Vernonia School Dist. 47J*, 796 F. Supp. 1354, 1363 (D. Or. 1992) (specifically distinguishing itself from this case). *See* Pet. App. A at 18a: "[I]t cannot be said that university students, simply because they are university students, are entitled to less protection than other persons under the Fourth Amendment." (Citation omitted).

*Cf. Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd mem.*, 930 F.2d 915 (5th Cir. 1991) (invalidating random urine testing of high school students involved in all extracurricular activities); *Anable v. Ford*, 653 F. Supp. 22, *modified in part* 663 F. Supp 149 (W.D. Ark. 1985) (urinalysis of students unconstitutional given insufficient evidence to justify intrusive procedures).

Finally, the University points to a single state court decision that relies solely on state constitutional law principles. *See Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr. 2d 834 (1994). To the extent there is any conflict concerning the appropriate legal standard regarding suspicionless urine testing of professional, collegiate, or high school athletes in particular, it is one that reflects the application of different *state* constitutional principles. *Compare, Hill*, 7 Cal.4th at 48-49, 865 P.2d at 663, 26 Cal.Rptr.2d at 865 (random urine testing of college athletes by private organization does not violate state constitution) *with, Horsemen's Benevolent and Protective Ass'n v. State Racing Comm'n*, 403 Mass. 692, 532 N.E.2d 644 (1989) (random urine testing of state-licensed jockeys violates Massachusetts Constitution).[8]

The University's petition is premised on a misunderstanding of

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[8] At several points in its opinion, the Colorado Supreme Court explicitly held that the University's urine testing programs also violated Art. II, §7 of the Colorado Constitution. Pet. App. 12a, 34a, 41a. While the court did not specifically rely on the state constitution as an adequate and independent state ground within the meaning of this Court's holding in *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Colorado courts uniformly concluded that the University's suspicionless urine testing violated the Colorado Constitution. *See* Pet. App. B at 81a (Colorado Court of Appeals); Pet. App. C at 96a-100a (trial court noting that Colorado Constitution does not recognize "special needs" exception to warrant and probable cause requirements). Thus, while this Court is not formally deprived of jurisdiction, a subsequent resolution of this case on state constitutional grounds is surely more than a remote possibility.

the application of clear legal principles to a wide variety of factual situations. This case simply does not warrant review for the purpose of reexamining that application to an extensive trial record.

## II.

## ON THE SPECIFIC FACTS DEVELOPED AT TRIAL, ALL FOUR VERSIONS OF THE UNIVERSITY'S PROGRAMS COMPELLING RANDOM, SUSPICIONLESS URINE TESTING OF STUDENT ATHLETES, STUDENT TRAINERS, MANAGERS AND CHEERLEADERS CONSTITUTE UNREASONABLE SEARCHES IN VIOLATION OF THE FOURTH AMENDMENT.

In its decision, the Colorado Supreme Court correctly balanced the competing interests as described in *Skinner* and *Von Raab*. The court set forth its methodology as follows:

> We must . . . balance individual student athletes' privacy expectations against CU's governmental interests to determine whether CU's random, warrantless, suspicionless urinalysis-drug-testing program is unreasonable under the Fourth Amendment.

Pet. App. A at 14a-15a, citing *Skinner*, with its reference to *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), *Delaware v. Prouse*, 440 U.S. 648 (1979), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

**Student privacy expectations.**

This Court has acknowledged that privacy concerns attendant to collection of urine samples are not minimal in "most contexts." *Skinner*, 489 U.S. at 626. Guided by *Skinner* and *Von Raab*, the Colorado Supreme Court carefully measured the contextual factors this Court has deemed relevant in evaluating the intrusiveness of the University's urinalysis programs. It found that the University's

programs share many of the attributes commonly identified in other post-*Skinner* and *Von Raab* cases as exacerbating the privacy intrusion visited upon persons subject to suspicionless urine testing. Unlike the railway employees in *Skinner* or the elite Customs Service agents in *Von Raab*, the college students subject to testing under the University's program did not have significantly diminished privacy expectations, particularly in light of the intrusive nature of the urine collection procedures.

The University required student trainers to directly observe athletes, other student trainers, managers and cheerleaders in the act of urination. (Tr. 233). While the court also found that aural monitoring of urination was significantly intrusive, Pet. App. A at 21a & n.20, this Court has recognized the heightened privacy intrusion resulting from direct visual monitoring. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672-673 n.2 (procedures minimize intrusion because there is no direct observation).

Moreover, the urine samples here are collected in a context far from the professional surroundings of a physician's office or hospital. *Cf. Skinner*, 489 U.S. at 626-27 (privacy concerns diminished by medical environment of testing). Instead, students were forced to submit urine in a locker room or in a bathroom behind a coach's administrative office in front of their peers. *See* Pet. App. A at 20a-23a & nn.20-22.

Student athletes surely may be subject to some University regulation. Given the testimony, however, the Colorado Supreme Court questioned the University's assertion that affected students were "extensively regulated," pointing out that only athletes in some sports were subject to certain rules. *Id.* at 23a-24a; *see, e.g.*, Tr. 193. The court noted there was no evidence that student trainers, managers and cheerleaders were regulated in any way. *Id.* at 24a & n.23.

**The University's interests.**

The Colorado Supreme Court held that the interests advanced by

the University were not sufficient to outweigh the legitimate privacy expectations of the athletes, student trainers, managers and cheerleaders. In light of the comparatively weighty governmental interests that have been found to justify suspicionless urine testing in more serious contexts, the court questioned whether some of the University's asserted interests were even significant. *Id.* at 33a. *Contrast with Skinner*, 489 U.S. at 628 (critical need to protect against known risks of injury to others) *and Von Raab*, 489 U.S. at 674 ("extraordinary safety and national security hazards").

The University contends that it has overriding interests in: (1) preparing its athletes for (private) NCAA competition; (2) promoting integrity in its athletic programs; (3) preventing other students not subject to testing from using illegal drugs, by ensuring that athletes, student trainers, managers and cheerleaders, are "role models;" (4) promoting fair competition in athletics; and (5) promoting the health and safety of the students who are required to provide urine samples.[9]

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[9] The University has generally labelled the government interest in its drug testing programs as "extremely important." (Pet. at 19). It has singled out different aspects as being "compelling" or "clearly compelling" (athlete health and safety, *id.* at 19-21; education, *id.* at 20), "strong" (fair competition, *id.* at 19-20), "especially compelling" (deterring use of steroids, *id.* at 20, which the University inaccurately states were shown to be used at the University), and "unquestionably . . . important" (deterring general drug use, *id.* at 20).

The University quibbles with the Colorado Supreme Court because it concluded that the University's interest in protecting the health and safety of its athletes was "unquestionably significant," instead of "compelling." (Pet. at 21). The Colorado Supreme Court rejected such formulaic designations in favor of the sensitive balancing required by *Skinner* and *Von Raab*:

> "[R]ather than trying to characterize CU's interests as "compelling," "strong," "substantial," or of some lesser degree of importance, we think it is more instructive simply to compare them with other types of commonly asserted interests that have been held sufficient or

(continued...)

None of these interests, together or alone, is comparable to the type of broad, public safety concerns or other governmental interests asserted in *Skinner* or *Von Raab*. As the Colorado Supreme Court properly observed, it is unclear why the University has a weighty *governmental* interest in preventing its athletes from being disqualified at NCAA sponsored events or in promoting fair competition. Pet. App. A at 33a-34a. The court similarly rejected the "role model" interest as both too speculative and attenuated to constitute an adequate justification for intrusive suspicionless urine testing. *Id.* at 33a & n.30; *accord* Taylor, 888 F.2d at 1196 (rejecting generalized integrity interest).

The only interest that seriously could be considered meaningful in this context would be the University's promotion of the health and safety of student athletes, an interest that admittedly does not pertain to cheerleaders, trainers, or managers. Yet it is noteworthy that the University identified virtually no drug use among its student athletes and produced no evidence of any harm to the health or safety of athletes resulting from drug use. (Tr. 197-198).[10] The government may not always be precluded from establishing a drug testing program simply because there is no demonstrable drug-related safety problem. *Von Raab*, 489 U.S. at 674. Nevertheless the absence of such difficulties is still a factor to be weighed in assessing the significance of the government's

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[9](...continued)
insufficient to justify similar intrusions."
Pet. App. A at 31a.

[10] During the first two years of the University's program detection levels were improperly set, *e.g.*, for cannabinoids 20-25 nanograms per milliliter, probably accounting for false positives. (*See* Tr. 218-220, 324-325). At the end of the second year of testing the University brought the standards to within accepted norms (positives reported only above 50 nanograms) and the positive test results all but disappeared. (*See* Tr. 324; Ex. 42).

asserted interests.[11] *See Brooks*, 730 F. Supp. at 761 (high school extracurricular activities drug testing program stricken where little evidence that drug use constituted a real problem).

In light of the extensive factual record demonstrating the strong privacy expectations of the students -- given the specifics of how the programs worked, the limited nature of the government interests in the context of college sports, and the broad class of students covered -- the Colorado Supreme Court's decision was fully justified as an application of the Fourth Amendment reasonableness test.[12]

## III.

## THE COLORADO SUPREME COURT PROPERLY RELIED UPON THE TRIAL COURT'S FACTUAL CONCLUSION THAT THE EVIDENCE ESTABLISHED THE INVOLUNTARY NATURE OF "CONSENT" EXACTED FROM STUDENTS UNDER THE UNIVERSITY'S DRUG TESTING PROGRAMS.

After carefully reviewing the ample trial record, the Colorado Supreme Court agreed that the University had not met its burden

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[11] The University relies in part on anecdotal evidence of highly publicized, isolated incidents involving the death of persons who were famous athletes. To suggest that significant privacy intrusions can be justified on so slim a demonstration of even remotely possible harm is to engage in "a kind of immolation of privacy and human dignity in *symbolic* opposition to drug use." *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (emphasis added).

[12] Academic commentary on this issue is by no means uniform. *See, e.g.*, LeRoy Pernell, *Random Drug Testing of Student Athletes by State Universities in the Wake of Von Raab and Skinner*, 1 MARQ. SPORTS L.J. 41, 84 (1990); Stephen F. Brock & Kevin M. McKenna, *Drug Testing in Sports*, 92 DICK. L. REV. 505 (1988). The University's implication otherwise, (Pet. at 14 n.4), is misleading.

of demonstrating that students' consents to urine testing were voluntary. Pet. App. A at 41a. In so doing, the court emphasized that the trial court's factual findings on consent must be affirmed unless they were clearly erroneous. *Id.* at 35a. That decision was consistent with this Court's admonition that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227.[13]

The court appropriately viewed the consent issue as involving a factual dispute. Its conclusion was reliably based on evidence that -- generally speaking -- the University provided insufficient notice about the programs.[14] Consent to testing was exacted after students already had made financial and other commitments to the attend the University and participate in its athletic programs. Pet. App. A at 40a; (Tr. 65-67, 69, 119, 121-122). Accordingly, the consent forms signed by the students under the University's program were not "intelligently and freely given, without any duress, coercion or subtle promises or threats calculated to flaw the free and unconstrained nature of the decision." Pet. App. A at 34a (quoting *People v. Carlson*, 677 F.2d 310, 318 (Colo. 1984) citing [*Schneckloth v.*] *Bustamonte*).

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[13] In its opening brief before the Colorado Supreme Court the University argued that it had met the requirements of *Schneckloth*, and the students' consents were factually voluntary. In its reply brief the school changed its position and argued that only the question of unconstitutional conditions was at issue. The Colorado Supreme Court noted this logical inconsistency. Pet. App. A at 36a n.33.

[14] At trial the University attempted to show that adequate detailed notice was given to "recruited" students. Yet the school offered no testimony as to how many of the students in the programs fell into that class. (*See, e.g.*, Tr. 183-185). For those many athletes, student trainers, managers and cheerleaders not recruited, information was sketchy (Tr. 119) or non-existent until the athlete appeared at the beginning of the school year to sign the consent form. (*See, e.g.*,Tr. 65-67).

Properly viewed, the Colorado Supreme Court's holding addresses only the matter of consent as a defense to an otherwise unreasonable search. As explained by that court, the fact that this case was a class action simply meant that it had to address whether the systemic exaction of consent, under the "procedures routinely followed in the implementation of the drug-testing program, as applied to student athletes typified by those who testified at trial" was voluntary. Pet. App. A at 40a. It concluded that they were not.[15] Persons subject to testing could not be considered to have voluntarily agreed to testing when subject to untoward coercion. *See, e.g., American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 736 (S.D. Ga. 1986)(concluding that named plaintiffs in class action suit did not voluntarily give consent); *Bostic v. McClendon*, 650 F. Supp. 245, 249 (N.D. Ga. 1986).

The Colorado Supreme Court refused to address the University's contention that this approach was analytically inconsistent with the doctrine of unconstitutional conditions, on which the trial court was held to have relied only as an alternative holding. Pet. App. A at 36a. While the University might wish that the Colorado Supreme Court had decided the consent issue under unconstitutional conditions analysis, based on the evidence it did not. In fact, given the record, for the Colorado courts to have decided the consent issue as anything other than a factual dispute would have been grave error.[16] *Id.* at 41a-42a n.36.

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[15] This conclusion does not, however, foreclose the possibility that an individual student, given appropriate notice and opportunity, might in some circumstances voluntarily consent to such testing. In fact, for the last five years the University has publicly been reported to have been operating a truly voluntary drug testing program which is not the subject of this litigation.

[16] In refusing to reach the unconstitutional conditions question the Colorado Supreme Court repeated a basic premise:

> "'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is

(continued...)

The University has presented no clear reason why the consent issue is worthy of this Court's review. As with its contention concerning the underlying Fourth Amendment issues, the University's argument is premised on the argument that the Colorado Supreme Court misapplied well-established doctrine, a doctrine this Court has recognized as inherently fact-based. *Schneckloth*, 412 U.S. at 227.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[16](...continued)
that we out not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'"
Pet. App. A at 41a n.36 quoting *Jean v. Nelson*, 472 U.S. 846, 854 (1985), and *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944).

(3)

Supreme Court, U.S.
FILED
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**No. 93-1410**

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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UNIVERSITY OF COLORADO, BOULDER,
through its Board,
THE REGENTS OF THE UNIVERSITY OF COLORADO,
a body corporate;
JUDITH ALBINO, as President of
the University of Colorado, Boulder; and
WILLIAM MAROLT, as Athletic Director,
Department of Intercollegiate Athletics,

*Petitioners,*

*v.*

DAVID DERDEYN, individually and on behalf of all others similarly situated,

*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the most significant points the University raises in its petition. Although Respondents disparage the importance of the University's interest in preventing drug abuse by student athletes, they effectively concede the importance of the University's interest in protecting "the health and safety of student athletes."[1] Opp. 19. Respondents also acknowledge that federal appeals courts have ruled that athletes, including high school athletes, may be subject to random drug testing without violating their Fourth Amendment rights. Opp. 14. And while they do not dispute that this Court in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), upheld drug testing programs more intrusive than the University's programs here, respondents make no effort at all to explain how the governmental interests in these cases could be greater than those in this case or how the privacy interests here could be more substantial.

Beyond this, respondents do not deny that the ACLU has brought lawsuits across the nation challenging similar drug testing programs at other schools. Nor do they deny that the underlying federal constitutional issues are certain to recur with

[1] Respondents' repeated mention of "student trainers, managers, and cheerleaders" as members of the plaintiff class on nearly every page of their brief obscures the fact that this case primarily concerns student athletes. The student trainers, managers, and cheerleaders who are members of the class (none of whom testified at trial) comprise only a handful of students, and their numbers are insignificant compared to the number of athletes subject to the University's program. Nonetheless, the University's concerns about preventing illicit drug use are equally applicable to this small group. Cheerleaders executing a drill requiring balance or split-second timing are as susceptible to injury as any other athlete if drug-impaired. They also serve as role models for other students, and their violation of drug rules can be expected to have a demoralizing effect on the University's athletic program. All of these individuals are intimately associated with the team, and there is no constitutionally significant distinction between them and student athletes.

frequency, draining the scarce resources of schools that become targets of ACLU-fostered litigation.

As respondents remind this Court, all of the University's random testing programs have been nullified. The University is not even allowed to adopt a program based on the full, informed, and written consent of participants. This creates a significant crisis for University officials and others responsible for the safety and welfare of student athletes and for the integrity of athletic programs across Colorado. As the University's athletic director William Marolt testified, the social, academic, and athletic pressures on 17 to 22-year-old college athletes create a strong need for a reason to say "no," which the University's drug testing program previously gave them (Tr. 187).

That every version of the University's program has been nullified by the court below leaves the University with no effective alternative to cope with the drug problem. And it sends a chilling message to any school that might consider adopting such a program in the future: in Colorado, there is no way to protect students, so there is no point in even trying.

The Colorado Supreme Court's decision has tremendous practical importance to thousands of college and high school students in Colorado, and to the parents who rely on school administrators to protect the safety and welfare of their children. Given the vigorous dissenting opinions of the two justices below, this is plainly a case that merits further review.

## I. THERE IS NO SIGNIFICANT FACTUAL DISPUTE.

Respondents argue that this case presents merely a "factual dispute." In reality, there is no significant dispute about the facts at all. The opposition acknowledges that the University's programs "called for urine testing," that the "[t]ests were designed to be truly random," and that students signed "a University form purporting to give 'consent' to testing." Opp. 2. They also admit that students received consent forms at "team meetings," and discussed them with coaches and trainers. Opp. 6. Although they

claim that some students were "surprised" by the form (*ibid.*), they do not claim that *anyone* failed to understand the information given, or that pressure was placed on anyone, apart from denial of participation in sports and financial aid that was contingent on an athletic scholarship. There is no dispute, moreover, that the NCAA requires "participants in post-season competition to submit to random urine testing," confirming the University's assertion that drug testing is an established part of the athletic training regimen in this country. Opp. 6. Respondents also agree with our assertion that "[s]tudent athletes surely may be subject to some University regulation." Opp. 17.

Significantly, there is no claim in the brief in opposition that the drug problem at the University of Colorado is different from that at any other campus where thousands of students attend college; and there is no denial of the University's showing that steroids and stimulants are physically harmful to student athletes and unfairly influence athletic competition, or that athletes are more inclined than other students to use them.

There is thus no dispute about the relevant facts here, only about their legal significance. The undisputed core of facts squarely raises the legal question presented in the petition, a recurring question of great public importance. This Court may take the facts as presented in the opinions of the courts below and render its decision on the constitutional issues without regard for irrelevant "factual complications" suggested by respondents. Opp. 12.

## II. THE DECISION BELOW CONFLICTS WITH RULINGS IN OTHER JURISDICTIONS.

Respondents try to deny that there is any conflict among appellate courts on the precise issue presented by distinguishing high school and professional athletes from college athletes. But the state's interest in protecting the health and safety of college athletes is surely the same as its interest in protecting high school athletes, as is its interest in preserving the integrity of athletic

competition at all levels, amateur and professional.[2] If anything, the state's interest is greater in college than in high school; on a college campus there are no parents present to supervise students or to protect them from the temptation of drug abuse.

Every other court applying a balancing test that weighs the government's interest in safe and fair competition against the privacy expectations of athletes has ruled in favor of the state. *See Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (high school athletes); *DiMeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (professional athletes); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1987) (same); *O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988) (college athletes); *Acton v. Vernonia School Dist. 47J*, 796 F. Supp. 1354 (D. Or. 1992) (high school athletes); *see also Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr.2d 834 (1994) (college athletes). Far from showing that the Colorado Supreme Court's decision is consistent with other appellate decisions, respondents have only emphasized its singularity.

Respondents' citation (Opp. 15) to the district court decision in *Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd without op.*, 930 F.2d 915 (5th Cir. 1991), only highlights the conflict in authority. The program invalidated in *Brooks* was much broader than the University's program here, and the relationship between drug use

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[2] Respondents try to distinguish *DiMeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc), as a case "where there were more demonstrable safety interests and where legalized gambling heightened integrity concerns relating to the public fisc." Opp. 14. The same interests exist here, for example, with regard to football. Athletic Director Marholt testified that football players are peculiarly susceptible to injuries due to the nature of the sport (Tr. 177-78). He also testified that football provides the revenue that supports other University programs (Tr. 192-93). Public perception that football games were "rigged" would drastically diminish this revenue. There is no significant difference between the athletes in *DiMeo* and football players here.

and non-athletic extracurricular activities, as well as the school district's justifications for its program, were vague. In *Brooks*, Judge Gibson held that a random drug testing program may be reasonable if "prompted by circumstances other than ordinary," 730 F. Supp. at 764, and then explicated the circumstances that would justify such a program, all of which are present here:

> A special interest required to justify the urinalysis program could exist . . . if it were shown that participants in extracurricular activities are much more likely to use drugs than non-participants, or that drug use by participants interfered with the school's educational mission much more seriously than does drug use by non-participants.

*Ibid.* Neither interest was shown in *Brooks*, and the court found that the program, applicable to *all* students who participated in extracurricular activities, was unconstitutional. 730 F. Supp. at 765-66.[3]

Here, by contrast, the undisputed evidence was that, as to steroids and other performance-enhancing drugs, use by athletes is far more prevalent than by non-athletes (Tr. 658-60). The University clearly has a greater interest in detecting and deterring drug use among intercollegiate athletes than among the general student population. The reduced privacy expectations of the locker room and training environment are also "extraordinary" and unique to the student athlete group.

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[3] The court expressly distinguished the drug testing program for high school athletes upheld in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1989), on the ground that "the evidence before the *Tippecanoe* district court was significantly different than the evidence at bar, with the program approved by the Seventh Circuit considerably more limited than the one before this Court." *Brooks*, 730 F. Supp. at 766. Likewise, the University's programs here were more limited than that in *Brooks*.

## III. THE COLORADO SUPREME COURT MISAPPLIED THE DECISIONS OF THIS COURT.

Respondents assert rhetorically that the Colorado Supreme Court applied *Skinner* and *Von Raab* "meticulously" in this case.[4] Ironically, they make no attempt to demonstrate that the rulings in those cases were correctly applied here. To the contrary, respondents do not even acknowledge that in both *Skinner* and *Von Raab* this Court upheld drug testing programs because the governmental interests outweighed any privacy interest. Nor do respondents address the numerous parallels between those cases and this case.

According to respondents, *Skinner* and *Von Raab* merely announce generalities concerning the applicability of the Fourth Amendment to drug testing programs and the need to "weigh" privacy interests against governmental interests. Respondents proceed to trivialize the University's interests in safe and fair competition while exalting the privacy interests of athletes who routinely undress, shower, and urinate together. The result reached below conflicts in principle with this Court's reasoning in *Skinner* and *Von Raab*; the opinions of the dissenting justices below show that the legal standards set forth in these cases need to be reaffirmed in the context of college athletics. Although respondents pretend that no useful articulation of the law could be made in this case beyond the analysis laid out in *Skinner* and *Von Raab* (Opp. 13), the context of athletic competition is extremely important in its own right. In the precise context here,

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[4] Respondents concede that there are no adequate and independent state grounds for the Colorado Supreme Court's decision under *Michigan v. Long*, 463 U.S. 1032 (1983). Opp. 15 n.8. Their suggestion that "a subsequent resolution of this case on state constitutional grounds is surely more than a remote possibility" is sheer speculation, and erroneously implies that the court below would disregard this Court's Fourth Amendment decisions after having previously followed them under state constitutional standards. *See, e.g., Orr v. People*, 803 P.2d 509 (Colo. 1990); *People v. Rister*, 803 P.2d 483 (Colo. 1990). In any event, this is plainly an insufficient reason to deny certiorari. *See Colorado v. Bertine*, 479 U.S. 367, 370 (1987).

the authorities are in conflict, and the people of Colorado are entitled to guidance on how the Fourth Amendment applies to it.

Respondents make only a conclusory attempt to show that student athletes have substantial privacy interests. Their position amounts to an overly fastidious objection to urinating "in a locker room or in a bathroom behind a coach's administrative office in front of their peers," Opp. 17, a procedure that one member of the women's basketball team said was "no big deal" (Tr. 496). Respondents make no effort to deal with the case law holding that urination on athletic teams occurs in a common lavatory setting, *see DiMeo*, 943 F.2d at 682, and that all athletes anticipate that the team environment will involve substantial intrusions on their privacy. *See Schaill,* 864 F.2d at 1319; *O'Halloran,* 679 F. Supp. at 1004-05; *Hill,* 865 P.2d at 658. Their position boils down to the unilateral assertion that "We don't like it" (Tr. 126), or, as one student put it, "I felt it was a bummer" (Tr. 65). The question under the Fourth Amendment, however, is whether society deems their privacy expectations to be reasonable in the specific context of a college athletic program.

On the other hand, respondents trivialize the University's interests in protecting the health and safety of its student athletes, in promoting fair competition, and in deterring drug use, the primary reasons for the program (Tr. 165). Obviously, the health and safety of young people, with whose care and protection the University is charged, is an enormously important interest; it is irresponsible for respondents to suggest otherwise. To argue that there is no *governmental* interest in ensuring fair competition (Opp. 19), where the government itself promotes and sponsors that competition, is absurd. If school athletic administrators have no interest in promoting fair competition, then it is hard to understand why they exist at all. And, the Colorado Supreme Court's rejection of the "role model" rationale for athletic drug testing merely highlights the conflict in appellate authority. *See Schaill,* 864 F.2d at 1320-21.

Respondents assert that the absence of a demonstrable drug problem weighs against the University's interests. Opp. 20.[5] But it is irresponsible to suggest that this in any way lessens the University's interests, or that health and safety concerns are *de minimis* until a more serious problem arises. Even the court below conceded that *preventing* drug use by students is a significant public safety interest. *University of Colorado v. Derdeyn,* 863 P.2d 929, 945 n.30 (Colo. 1993) (Pet. App. 33a); *see Von Raab,* 489 U.S. at 674.

## IV. CONSENT TO DRUG TESTING WAS VALIDLY OBTAINED.

Respondents cite no evidence of overbearing conduct or pressure by the University in obtaining written consent to drug testing; there is no suggestion that college students did not understand the simple English disclosures. Respondents' argument boils down to the position that consent was coerced because financial aid and athletic participation were adversely affected.[6] But this only brings them back to the "unconstitutional conditions" doctrine on which the trial court relied (Pet. App. 101a-102a), which they do not even try to defend.

There is no basis for the conclusory assertion that the consents here were not "knowingly and intelligently" given, or that there

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[5] Although respondents make much of evidence that after the second year of testing, "the positive results all but disappeared," Opp. 19 n.10, this evidence establishes only that the program was an effective deterrent. Respondents also argue that "anecdotal evidence of highly publicized incidents" involving the deaths of famous athletes cannot justify the University's program. Opp. 20 n.11. But as Athletic Director Marolt testified, the impetus for the stricter program implemented in 1986 came directly from the drug-related deaths of Len Bias and Don Rogers, and from University Police reports that athletes had circumvented the prior, more lenient program (Tr. 179-80). These incidents reflected not "remotely possible harm," but a strong and ever-present danger.

[6] In fact, David Derdeyn testified that he had to agree to participate in the University's drug testing program regardless of whether he received financial aid (Tr. 42).

was any "untoward coercion" merely because athletic participation or financial aid is affected. *See University of Colorado v. Derdeyn,* 863 P.2d at 952 (Pet. App. 46a) (Rovira, C.J., dissenting). That respondents would make this argument without any supporting evidence confirms the purely *legal* error in the decision below. Athletes were given written disclosure statements in advance and were not forced to sign immediately, they had an opportunity to discuss the subject and the option of withdrawing from sports or from the University, they were of sufficient age to understand their decision and were under no custodial pressure whatever. If this was not knowing and voluntary consent, then it is difficult to comprehend what is.

Once again, the issue is not a narrow one; to the contrary, it has great practical importance for schools across Colorado. If the consents obtained here do not pass constitutional muster, then no school can develop a drug testing program based on the consent of its participants.

## CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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